Supreme Court of the United States

OCTOBER TERM, 1971.

Nos. 71-1017
71-1026

MIKE GRAVEL, UNITED STATES SENATOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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v.

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Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

CONSOLIDATED BRIEF OF SENATOR MIKE GRAVEL.

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Opinion Below.

The opinions of the United States Court of Appeals for the First Circuit and the Protective Order (as modified) are not yet reported and are reproduced in the petition for writ of certiorari filed by each party hereto. The opinion of the District Court is reported at 332 F. Supp. 930 (D.C. Mass. 1971).

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on January 7, 1972 and was amended on January 18, 1972. A timely petition for rehearing was denied on January 18, 1972, and Senator Gravel's petition for writ of certiorari was filed on February 9, 1972. The Solicitor General petitioned for writ of certiorari on February 10, 1972. Both petitions were granted on February 22, 1972. The mandate of the Court of Appeals was stayed by Mr. Justice Brennan acting as Circuit Justice on January 24, 1972, pending the filing and disposition of the petition for writ of certiorari, provided that filing of the petition occur on or before February 10, 1972. The stay was extended until disposition of the case on the merits, and an expedited schedule was ordered upon motion of the Government.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Court of Appeals rightly held that there was jurisdiction under 28 U.S.C. § 1291 because Senator Gravel had no other means of obtaining review and consequently the denial by the District Court of his motion to quash was, as to him, a final appealable order. *Perlman* v. *United States*, 247 U.S. 7 (1918). See *United States* v. *Ryan*, 402

U.S. 530, 533 (1971). The Court of Appeals' finding in this regard has not been challenged by either party hereto. Similarly, this Court has jurisdiction.

Questions Presented.

Questions presented by Senator Gravel:

1. Does the constitutional responsibility of a United States Senator to inform his constituents and colleagues about the workings of government require that his actions in publishing an official, public record of the subcommittee of which he is chairman, containing documentary information critical of executive conduct in foreign affairs, be accorded protection as legislative activity under the Speech or Debate Clause?

2. May a federal grand jury at the request of the executive branch inquire into and investigate the legislative activities of a senator by utilizing compulsory process to interrogate persons with whom a senator dealt and to secure documents about his planning and executing a senate subcommittee hearing and publishing the official record of that hearing?

3. May an otherwise impermissible inquiry be allowed because the legislative activity in question was carried out in a manner deemed by a federal court to be irregular and contrary to the court's notions of germaneness and of the proper way for the Senate to internally allocate its functions?

Questions presented by the Solicitor General:

4. Whether Article I, section 6, of the Constitution providing that "... for any Speech or Debate in either House," "the Senators and Representatives . . . shall not be questioned in any other Place" bars a grand jury from ques-

tioning aides of members of Congress and other persons about matters that may touch on activities of a member of Congress which are protected "Speech or Debate."

5. Whether an aide of a member of Congress has a common law privilege not to testify before a grand jury concerning private republication of material which his senator-employer had introduced into the record of a Senate subcommittee.

Constitutional Provision Involved.

Article I, section 6, of the United States Constitution, commonly referred to as the Speech or Debate Clause, provides:

> "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other place.* (Emphasis added.)

Statement of the Case.

The facts which form the basis for all of the legal submissions in this case are undisputed and are reported in the decisions of the District Court (S.G.P. 38)[1] and Court of Appeals (P.W.C. 1a).

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[1] All reference to the appendices to Senator Gravel's petition for a writ of certiorari are referred to as "P.W.C." since under the Rules of this Court the material contained in the appendices to the petition for a writ of certiorari need not be reprinted in the joint appendix. All references to the appendices to the Solicitor General's petition for a writ of certiorari are referred to as "S.G.P."

Senator Mike Gravel is a duly elected and certified member of the United States Senate and chairman of the Senate Subcommittee on Buildings and Grounds. On June 29, 1972, he convened a public meeting of the subcommittee with United States Congressman John Dow testifying as a witness. During the course of the meeting, Senator Gravel read and inserted into the official subcommittee record part of the material commonly referred to as the "Pentagon Papers" (P.W.C. 2a). Senator Gravel stated at the outset of the hearing that the conduct of United States foreign policy in Indochina was relevant to his subcommittee, as to practically every subcommittee in the Congress, because of its effects upon the domestic economy, and specifically, the lack of sufficient federal funds to provide for adequate public facilities (S.G.P. 46-47). In order to make the contents of the subcommittee record widely available to his colleagues and to the electorate, Senator Gravel arranged, without any personal profit to himself, for its verbatim publication[2] by Beacon Press, a nonprofit publishing division of the Unitarian Universalist Association (P.W.C. 2a). Also in July, the Department of Justice and the United States Attorney for Massachusetts requested the United States District Court for the District of Massachusetts to convene a grand jury.

On August 24, 1971, the federal grand jury sitting in Boston and investigating the release of the Pentagon Papers, subpoenaed Dr. Leonard Rodberg, an aide to Senator Gravel, and ordered him to appear and give testimony three days later before the grand jury (App.–6). Dr. Rodberg had become a member of Senator Gravel's personal legislative staff on June 29, 1971, and acted from that

[2] The publication of the subcommittee record by Beacon Press has been variously referred to in the briefs and opinions of the Court below as "publication" and "republication." We use the term "publication" throughout this brief.

point on under Senator Gravel's direction and control.[3] Dr. Rodberg is still on the personal legislative staff of Senator Gravel (App. 11). On August 27, 1971, Dr. Rodberg moved to quash the subpoena in the court below (App. 5-7). On that same date Senator Gravel moved to intervene, which motion was briefed by the parties and granted by the court below on September 1, 1971 (App. 1-2).

Senator Gravel then moved to quash the grand jury subpoena or for a specification of the purpose and scope of the inquiry (App. 2-4). Senator Gravel and Dr. Rodberg both alleged that the Internal Security Division of the Justice Department intended to interrogate Dr. Rodberg before the grand jury about the actions of Senator Gravel and his aides in making available to his colleagues and the electorate the contents of the material forming the subcommittee record, which was critical of executive conduct in foreign relations (App. 4, 6). Evidence in support of this allegation was introduced, and the Internal Security Division did not deny it (App. 9 and S.G.P. 42). On the contrary, the Internal Security Division asserted that none of the actions taken by Senator Gravel, including those at the subcommittee hearing, were privileged by the Speech or Debate Clause and that the Executive could subpoena and criminally prosecute Senator Gravel himself (App. 9-10). The Internal Security Division characterized the grand jury investigation as an "executive proceeding" (App. 8); and suggested that Senator Gravel himself might be subpoenaed at which time he could invoke his Fifth Amendment privilege against self incrimination (App. 8). The Internal Security Division also contended before

[3] Proof of Dr. Rodberg's status as a personal aide to Senator Gravel was established by affidavits of Dr. Rodberg (App. 6), Senator Gravel (App. 11) and the Sergeant-at-Arms of the Senate (App. 11).

the District Court that Dr. Rodberg was not a staff member of Senator Gravel (App. 51) and that the federal courts are the proper place and possess the power to determine the appropriateness, relevancy and germaneness of the subcommittee meeting (App. 85). Oral argument was heard on these motions on September 10, 1971.

On October 4, 1971, the District Court issued its memorandum of decision and protective order which denied Senator Gravel's motions to quash or for specification (S.G.P. 52). The District Court held that Article 1, section 6, clause 1 of the Constitution—the Speech or Debate Clause—prohibited the grand jury from making any inquiry of any witness about Senator Gravel's "conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 [or] about things done by the Senator in preparation for and intimately related to said meeting" (S.G.P. 52); and prohibited questioning of Dr. Rodberg "about his own actions on June 29, 1971, after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for or intimately related to said meeting." (S.G.P. 52.) The District Court "rejected the Government's argument [that the subcommittee meeting was unprivileged] . . . on the basis of the general rule restricting judicial inquiry into matters of legislative purpose and operations" (S.G.P. 47).

The District Court held, however, that Senator Gravel's actions in securing the public distribution of the official subcommittee record by its publication "stands on a different footing and, in the Court's opinion, is not embraced by the Speech or Debate Clause." (S.G.P. 48.)

The District Court made three basic findings of fact which were not appealed by the Justice Department:

> (1) Dr. Rodberg is and has been since June 29, 1971, a personal staff assistant of Senator Gravel (S.G.P. 38) (App. 54).
>
> (2) "[A]s personal assistant to [Senator Gravel], Dr. Rodberg assisted [Senator Gravel] in preparing for disclosure and subsequently disclosing to [Senator Gravel's] colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called 'Pentagon Papers,' which were critical of the Executive's conduct in the field of foreign relations." (S.G.P. 39.)
>
> (3) "Viewing together the crimes this grand jury is investigating and the chronology of acts and events leading up to Dr. Rodberg's subpoena, the Court infers that the government's interest in his testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the grand jury." (S.G.P. 42.)

On October 12, 1971, Senator Gravel filed before the District Court a motion for reconsideration and/or stay pending appeal. The court stayed enforcement of Dr. Rodberg's subpoena pending reconsideration and asked for a brief from the Justice Department on the issues presented. While this motion was under consideration by the court, counsel for Senator Gravel discovered that the grand jury had subpoenaed and intended to question witnesses about matters the Senator believes are protected from inquiry by Article I, section 6, clause 1, and the District Court's protective order of October 4, 1971 (App. 17). Counsel also discovered that the grand

jury had subpoenaed and intended to question witnesses about matters which were then under submission to the court. Among these witnesses was Howard Webber, with whom Senator Gravel had unsuccessfully negotiated for publication of the subcommittee record. Senator Gravel moved to intervene and quash the Webber subpoena, alleging that the grand jury intended to interrogate him solely about these activities (App. 17). The Justice Department did not deny any of these allegations, either in the District Court or in the Court of Appeals, and admitted in the District Court that its primary interest in Mr. Webber related to the conduct of Senator Gravel and his aides in attempting to publish the subcommittee record (App. 128). Moreover, the subpoena issued on Webber was *duces tecum* and directed him to produce records and notes of conversations held on July 23 with Dr. Rodberg "concerning the Pentagon Papers."[4]

On October 27, 1971, Senator Gravel filed in the District Court a motion for further relief seeking to prevent the inquiries discussed above by providing the court and Senator Gravel with some judicial mechanism for assuring that the court's protective orders and stays were being observed and that questions regarding the applicability of the court's protective order would be properly decided (App. 12). The District Court denied Senator Gravel's motion (App. 19).

The District Court granted Senator Gravel's motion to intervene with respect to the subpoena issued on Mr. Webber. While the court denied on October 28, 1971, Senator

[4] At the oral hearing on Senator Gravel's motion, counsel for the Internal Security Division stated *for the first time* that they did not intend to seek an indictment against Senator Gravel. However, even this belated disclaimer was not unqualified; counsel for the Internal Security Division stating, "this is not probable." (App. 127-128.).

Gravel's motion to quash Mr. Webber's subpoena, it granted the Senator a temporary stay on Webber's subpoena pending appeal to the Court of Appeals (App. 20). On the same day the District Court denied the motion for reconsideration in Dr. Rodberg's case but granted the Senator a temporary stay of Dr. Rodberg's subpoena pending appeal to the Court of Appeals (App. 21). On October 28, 1971, Senator Gravel sought by motion, but was denied, stenographic copies of the grand jury minutes (App. 19). On October 29, 1971, the District Court issued a supplemental protective order to its order of October 4, 1971 (App. 21). This supplemental protective order, issued so as to protect the Senator's position pending appeal, ordered the grand jury not to question any witness about the conduct of the Senator or his aides in arranging for the publication of the subcommittee record.

On October 28, 1971, Senator Gravel filed his notice of appeal in both cases with the clerk of the District Court and moved immediately in the Court of Appeals for a stay pending appeal. The Court of Appeals granted the stay on October 29, 1971 (App. 22-23). That same day, the United States filed a cross appeal to the Court of Appeals. Oral argument was had on an expedited schedule on November 10, 1971. Before the Court of Appeals the Internal Security Division asserted that the Speech and Debate privilege had no applicability at all to grand jury proceeding and therefore the Executive, in conjunction with the grand jury, could subpoena Senator Gravel and anyone who assisted him in the performance of his duties and interrogate them about all of the Senator's activities (P.W.C. 5a).

The Court of Appeals' opinion of January 7, 1972, noted that "'important questions as to the extent of the legislative privilege'' were raised by the appeals (P.W.C. 2a). The Court of Appeals concluded that Senator Gravel "has essentially lost his appeal," and affirmed the judgment of

the District Court and entered a modified protective order (P.W.C. 13a).

The Court of Appeals rendered its decision in three parts dealing with Senator Gravel and two parts dealing with those who assisted Senator Gravel in performing his legislative activities. With respect to Senator Gravel the court below held that "for what he says or does on the floor of the Senate or before the subcommittee [Senator Gravel] is concededly protected by the absolute privilege from all criminal and civil liability" (P.W.C. 5a) and that "this protection extends to any written reports of the committee proceedings . . . including material unspoken at the hearing but inserted directly into the record." (P.W.C. 5a.) The Court of Appeals also held that the Speech or Debate Clause prohibited "inquiries [of the Senator] which would restrict acquisition of information" since any other holding would "chill both the vigor with which legislators seek facts, and the willingness of potential sources to supply them." (P.W.C. 7a.) While holding that some forms of published congressional speeches or reports are "necessarily protected" (*i.e.*, news media or the Congressional Record), nevertheless the court held that the constitutional privilege of the Speech or Debate Clause did not encompass Senator Gravel's exercise of the informing function in publishing the subcommittee record and therefore did not bar grand jury investigation into this conduct (P.W.C. 9a).[5]

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[5] The Court of Appeals, admitting that "the court is not in total agreement" on this point, nevertheless "presently" held that the Senator and his aides could not personally be questioned as to "republication," . . . "without binding ourselves for future purposes." (P.W.C. 11a.) More exactly, the Court of Appeals found that the Speech or Debate Clause privilege did not extend at all to the "republication," but that the Senator and his aides may be protected from direct interrogation by a common law privilege (P.W.C. 10a-11a).

Turning its attention to legislative aides the court below held that the requirement "for a legislator to have personal aides in whom he reposes total confidence" was so strong that "the aide and the legislator [must be] treated as one" (P.W.C. 11a). Thus, the court held that in order to protect Senator Gravel's rights, the grand jury could not question his aide, Dr. Rodberg, with respect to any matter about which it could not question the Senator. Last, the Court of Appeals held with respect to those who assisted him in publishing the subcommittee record that so long as no effort is made to attack a legislator's motives "we can see no reason for them to be free of inquiry as to their own conduct regarding the Pentagon Papers including their dealing with intervenor [Senator Gravel] or his aides." (P.W.C. 12a.) Thus the opinion of the court below permits grand jury questions of Howard Webber, director of the Massachusetts Institute of Technology Press, and officials of the Beacon Press about how Senator Gravel prepared for the subcommittee hearings and his activities, and those of his aides, in publishing the official record of the hearings.

The Court of Appeals issued a subsequent opinion denying a motion for reconsideration in which it suggested that ordinary publication of a subcommittee record might enjoy constitutional immunity but that the publication in question did not because it was done "privately" and because the subcommittee had "no conceivable concern" with the documents entered into the record (P.W.C. 2c).

During the pendency of proceedings in the Court of Appeals, two subpoenas were served upon officials of Beacon Press but were revoked due to the stay in effect (App. 24, 141-149).

Summary of Argument.

I.

The speech and debate privilege has consistently been construed broadly by this Court to encompass actions of congressmen which are customarily done in relation to the business before the legislature and which fulfill important goals of representative democracy. The scope of the privilege has never been fixed, either in this country or in England, to outmoded usages and needs of the legislature, but has instead always corresponded to its actual workings. Such a construction of the privilege is necessitated by its history and by the major purpose for its inclusion in our Constitution, which was to preserve the rights of the people in representative government by reinforcing separation of powers and giving practical security to congressmen against potential harassment and intimidation by the Executive.

The publication of committee records critical of executive conduct in foreign relations is a classic example of the informing function of Congress. In our system of representative government, congressmen have the obligation to enlighten the electorate about matters of public concern and in particular about the administration of government by the executive branch. This function has been assiduously performed by congressmen throughout our history and is pivotal to our democratic values. Moreover, under basic principles of separation of powers, congressmen must be able to exercise their own judgment, independently of restraints by the executive and judiciary, of what information of public importance should be disclosed to or withheld from the people. Courts and prosecutors are not referees over what a congressman may say to the electorate or how he may say it. There is no assertion

here that the privilege is being used to violate an individual's constitutional rights; this is a classic separation of powers case.

The framers of the Constitution intended that the publication of congressional proceedings should be entitled to absolute privilege from inquiry under the Speech or Debate Clause. And in 1797, when a federal grand jury investigated the actions of a congressman who sent out newsletters critical of the administration's foreign policy (and said to contain military secrets), Jefferson and Madison wrote a comprehensive and eloquent protest. They stated that the Speech or Debate Clause was designed to guarantee to congressmen an absolute privilege, from the cognizance or coercion of the coordinate branches, to communicate with the electorate; and they condemned the grand jury investigation as a blatant violation of the Speech or Debate Clause.

The free speech guarantee of the English Bill of Rights of 1689, from which the Speech or Debate Clause derives, resulted from a prosecution of the Speaker of the House of Commons for publishing a committee report critical of the Crown. The English Bill of Rights was written specifically to insure that such publications would be guaranteed by the legislative privilege. In England, it is now settled by judicial decisions as well that the publication of legislative proceedings for the information of the electorate is immune from judicial inquiry. There is no reason why the privilege should be construed more narrowly in the United States.

Finally, it is well settled that the privilege is not divested by concepts such as "irregularity" and "nongermaneness." The privilege would be of little value if it turned, *ad hoc*, on such amorphous considerations. And Congress has exclusive power under the Constitution to prescribe rules

for its governance and to discipline wayward members; no supervisory power is vested in the courts.

II.

The Justice Department now concedes that Senator Gravel cannot personally be questioned before the grand jury about his legislative acts, but the Justice Department claims the right to conduct an intensive investigation into the Senator's legislative acts by asserting that everyone who assisted the Senator in discharging his duties may be subject to unrestrained interrogation. Such an investigation would yield precisely the same information about privileged conduct and would accomplish indirectly what is conceded to be prohibited by more direct intrusions—the intensive breach of the sanctity of the legislative process. For the grand jury to investigate, by direction or indirection, how and why a senator prepared and held a committee hearing and published the official record for dissemination to the electorate is a clear violation of Separation of Powers. And such an investigation implicates the same potential for the intimidation, harassment and distraction of a congressman as if he himself were questioned personally.

The same constitutional evil would result from the very substantial inquiry into privileged conduct permitted under the decision of the Court of Appeals, which allowed the compulsory interrogation of everyone with whom a congressman dealt except his personal aides, so long as the interrogators deny any intention to attack his motives. Given the realities of the modern-day legislative process, congressmen must seek the advice and assistance of persons outside their immediate staff in deciding, for example, whether to speak out and how to vote on controversial issues. The interrogation of these persons before the grand

jury about privileged legislative activity violates the doctrine of separation of powers and would substantially inhibit a congressman in the performance of his constitutional obligation. The unconstitutionality of such interrogation in no wise depends upon the motives of the interrogators.

The proposed inquiry by the executive branch in this case is particularly unseemly inasmuch as it has long and successfully championed a testimonial privilege for executive aides which it now seeks to deny to congressmen, even though the source of the latter's privilege is the Constitution itself. The reason for the application of the privilege against the questioning of aides is identical in both situations—the preservation of confidentiality in the decision-making process. This reason applies as well to printers who assist congressmen in performing the informing function; for without such assistance a congressman could not effectively communicate with the electorate. After much litigation in England, the British courts have held such printers immune from both questioning and accountability in order to effectuate the legislators' privilege.

Aside from the broadest of generalities, the Executive has offered no reason, even though it had ample opportunity to do so in the lower courts, why the breach of the privilege in this case would be helpful, let alone necessary, to it in the enforcement of the criminal laws. Nor would recognition of the privilege intolerably hamper law enforcement in the future. The Executive and grand jury possess ample means to ferret out crime without intruding into the legislative process. And those extremely rare cases where investigations would be hindered are more than outweighed by the preservation, intact, of our system of separation of powers.

Argument.

Introduction.

This case presents this Court with a classic separation of powers problem. The Executive, by seeking to invoke the aid of a judicial body, that is, the grand jury, with its broad subpoena and contempt powers, is trying to conduct an investigation into various aspects of a meeting of the Senate Subcommittee on Buildings and Grounds conducted by Subcommittee Chairman Senator Mike Gravel. While the Justice Department has refused to specify the questions which it seeks to put to witnesses concerning the subcommittee meeting and the preparations for it, as well as the subsequent preparation and publication of the record of that meeting, the Justice Department has from the start of these proceedings refused to deny that these subjects are precisely the objects of its inquiry.[6] The only conclusion which is possible on the basis of this record is that drawn by the District Court—that the Executive wishes to conduct an intensive investigation of Senator Gravel's preparation for the Senate subcommittee meeting and the subsequent publication of the record. The Senator, in all of the proceedings below, and in this Court, has sought and seeks an order sufficiently broad and workable to insure that his interests as a legislator, and those of his colleagues and constituents, are protected from unwarranted, unseemly and unconstitutional intrusion and inquiry by co-ordinate branches of government.

a. *The Scope of the Privilege Publication and the Informing Function.*

The Court of Appeals held that the privilege of the Speech or Debate Clause encompassed Senator Gravel's

[6] See S.G.P. 41, n. 3; App. 9, 42, 82.

activities in preparing for and holding the subcommittee hearing, and the Government has not appealed this holding. However, the Court of Appeals believed that the protection of the Clause does not go beyond the four walls of the Capitol and, specifically, does not protect the actions of a member of Congress in informing his colleagues and the electorate about executive conduct in foreign affairs through the publication of the subcommittee record. The court thus permitted the grand jury to investigate the Senator's actions in arranging for the record's publication through the compulsory interrogation of individuals whose assistance was indispensable in performing his constitutional function to inform his colleagues and the public.

The court's holding that the Senator's conduct in publishing this subcommittee record is subject to judicial inquiry is inconsistent with the history and purposes of the Speech or Debate Clause, the thrust of past decisions of this Court, and fundamental principles of separation of powers. We discuss this issue in Part I of this brief. We there show that the Clause has always been, and must be, construed liberally to insulate from judicial inquiry all of the customary and necessary functions of Congress, and that the publication of subcommittee reports reflecting on executive administration is a classic example of the well-recognized informing function and plays an important role in representative government. We also show that the framers of the Constitution specifically intended to prohibit grand jury investigations of congressmen who, in newsletters or otherwise, were critical of the executive stewardship of foreign relations. Finally, we show that the immediate purpose of the free speech privilege of the English Bill of Rights was to guarantee that publication of parliamentary proceedings be within the ambit of the privilege; and Parliament by statute and the English courts by judicial decisions have forbade inquiries of members

and printers who assisted them in publishing such proceedings. There is simply no support in history or policy for the contrary conclusion of the Court of Appeals.

b. *Executive and Judicial Inquiries into Privileged Legislative Activities.*

The Court of Appeals, by its opinion, would allow a very substantial inquiry by the executive and judicial branches into privileged legislative conduct, and this should not be allowed to stand. Yet the Justice Department seeks in this Court to intrude even further into the actions of a coordinate branch, and to subpoena a Senator's aides and those who assisted him in meeting his constitutional obligations and to interrogate them with respect to what even the Justice Department now concedes to be protected legislative conduct, such as the holding of a hearing.

At the early stages of these proceedings, the Justice Department adopted the stance that it could, if it wished, subpoena Senator Gravel, and, for that matter, other members of the Senate, in order to inquire about the holding of the subcommittee meeting and the preparation and publication of the record of the meeting.[7] The Justice Department also maintained in the District Court that no privilege existed and that it could indict and prosecute Senator Gravel himself for both holding the subcommittee hearing and publishing the record,[8] and in the Court of Appeals that the Senator could be interrogated and indicted but not prosecuted for the subcommittee hearing and interrogated, indicted and prosecuted for the publication of the record.[9] As the

[7] See App. 89-90.

[8] See App. 81-83, 84-85, 86-87, 90.

[9] See generally brief of Justice Department in the Court of Appeals.

case moved through the courts, the Justice Department, in evident response to the lower courts' obvious distaste for such a claim of power, retrenched to the position that it seeks only to subpoena the Senator's aides and other parties who worked with the Senator in preparing for the meeting and for the publication of the record. The Justice Department, then, appears content with the knowledge that it might accomplish, through the interrogation of the Senator's aides and assistants, what it was prohibited by both courts below from accomplishing by direct interrogation of the Senator—to conduct an intensive investigation of a Senator's legislative activities, to pierce the confidential relationship between the Senator and those who assisted him in the performance of his constitutional obligations, to learn every detail concerning the meeting and the publication.

The Justice Department has thus seen what appears to it to be a back door into the Senate committee rooms, but as we shall show in Part II, this back door is likewise blocked by the stone wall of the Speech or Debate Clause. The Clause must be interpreted and enforced in light of the requirements of the legislative branch and in light of the purposes of the Clause. We shall show that to allow the Justice Department to breach the separation of powers wall by pursuing a Senator's activities through questioning of his trusted aides and those whom he requires in order to perform his constitutional functions would be to accomplish precisely the same constitutional evil as if the Senator himself were interrogated directly. It would permit unrestrained intrusions by the executive and judicial branches into the Capitol. This would not only render illusory the protection secured to Senator Gravel from the constitutional guarantee but would threaten the very independence and integrity of the legislative branch.

PART I.

The Publication by a Senator of an Official, Public Record of a Subcommittee, of which he is Chairman, critical of Executive Conduct in Foreign Relations is Privileged from Judicial Inquiry by the Speech or Debate Clause.

A. The Privilege Must be Read Broadly to Protect Those Actions of Congressmen which Foster the Goals of Representative Government.

The Court of Appeals' holding that the publication of committee records containing information of overwhelming public concern was not within the purview of the Speech or Debate Clause was bottomed upon a narrow, almost literal reading of the Clause which limited its applicability to the four walls of Congress. This approach is basically inconsistent with prior opinions of this Court, which have held that the Clause embraces all actions of members of Congress which are necessary to effectuate the functions of Congress and to protect and foster the goals of representative government. It is also inconsistent with the historical application of the privilege in England and with the intentions of the framers.

1. *Prior Decisions of this Court.*

In the very first interpretation of the Speech or Debate Clause, this Court held that the history and policies underlying the Clause demanded that it be given a liberal construction to immunize from judicial inquiry not only speeches and debates on the floor but also committee reports, resolutions and votes and all things "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1880). Subsequent decisions have consist-

ently reaffirmed this standard and have applied the guarantee of the Clause to all activity of a congressman "in the sphere of legitimate legislative activity," *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951); and this Court has admonished that "the privilege should be read broadly" to include all conduct "related to the due functioning of the legislative process." *United States* v. *Johnson*, 383 U.S. 169, 172, 179 (1966).

By thus adopting a functional approach to the Clause and insulting the "legislative acts of . . . [a] member of Congress [and] his motives for performing them," *id.*, at 185, this Court was hardly indulging in "catch phrases."[10] On the contrary, this approach has derived from the basic purpose of the Clause, which is to immunize actions taken by a member of Congress in the discharge of his obligations as a representative of the electorate and thereby prevent intimidation and harassment by a possibly hostile executive and judiciary. This was nowhere better stated than by Chief Justice Parsons in the seminal decision of *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808)[11]:

> "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and

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[10] P.W.C. 8a.

[11] Quoted with approval in *Kilbourn*, *supra*, at 203-204.

to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, *for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber.*" (Emphasis added.)

The applicability of the Clause, therefore, does not turn on mere geographical considerations involving the fortuitous location of a congressman's activities but on the "exercise of the functions of [his] office." *Ibid.* It is for this reason that the Clause protects a legislator's conduct at committee hearings, for "[i]nvestigations, whether by standing or special committees, are an established part of representative government." *Tenney* v. *Bradhove, supra,* at 377. Likewise, a variety of other functions resulting from the nature of a congressman's office, such as voting and committee resolutions, *Powell* v. *McCormack,* 395 U.S. 486, 502-503 (1969), *Kilbourn* v. *Thompson, supra;* and obtaining material for committee hearings, *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), have been held within the privilege. In none of these cases was there involved speech or debate in the narrow, literalistic sense; yet, as the Court said in *Kilbourn, supra,* at 203, if the ordinary and necessary functions of Congress are not privileged, of what value is the Clause? A literalistic construction of the Clause in this case would overrule almost one hundred years of decisions.

The Court of Appeals did not deny that the recognized duties of congressmen include informing the electorate about the workings of government.[12] Indeed, that fact is a presupposition of our system of representative government, where "[l]egislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them," *Bond* v. *Floyd*, 385 U.S. 116, 136 (1966). See generally section I.B., *infra*. Nevertheless, the Court of Appeals simply held the informing function to be outside the protection of the Speech or Debate Clause by asserting that the Clause encompasses only *one* function "generally done" in Congress—the narrow category of congressional deliberations.[13] This limited view of the Clause cannot be reconciled with the reasoning in prior decisions of this Court, which stressed the legislative process *as a whole*. It is also inconsistent with the historical antecedents of the privilege in England and with the purposes for its inclusion in our Constitution.

2. *Historical Application of the Privilege in England.*

A review of the origins and development of the free speech privilege in England demonstrates clearly that its scope has always been determined by the actual functions of the legislature at any given moment in history and has never been frozen to past usages; in this manner, it has evolved as a *practical* instrument of security for legislators. Each of Parliament's privileges originated, in fact, in the fourteenth and fifteenth centuries out of a *judicial* conception of the House of Lords, the highest court of the

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[12] App. 9a-10a.

[13] App. 9a.

land.[14] The acquisition of similar privileges by the House of Commons was based on its function of acting on private petitions and was first limited to that narrow activity.[15] As the powers of the council decayed in the late fifteenth and early sixteenth centuries, the House of Commons asserted growing authority over bills submitted by the Crown, and a practical security against the King's oft-expressed displeasure became a felt necessity. It was "out of this need for unrestrained criticism of government measures"

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[14] See generally C. H. McIlwain, The High Court of Parliament and Its Supremacy, 229-246 (1910); C. F. Wittke, The History of English Parliamentary Privilege, 13-20 (1921); Neale, The Commons Privilege of Free Speech in Parliament, in 2 Historical Studies of the English Parliament 147-176 (Fryde & Miller ed. 1970); Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecution in the Courts, 2 Suffolk L. Rev. 1, 3-5 (1968).

Parliament of course claimed a number of privileges other than freedom of speech, and those too derived from judicial antecedents —*e.g.*, the freedom of members and their servants from arrest, and the right of each House to punish members and outsiders for contempt.

[15] Neale at 163. The judicial origin of the speech and debate privilege is well illustrated in *Strode's Case*, which this court has termed "one of the earliest and most important English cases dealing with the privilege." *United States* v. *Johnson*, *supra*, at 182, n. 13. In 1512, Richard Strode, a burgess of Parliament, was convicted for obstructing tin mining because he voted in favor of a bill controlling abuses against the tin miners. He was imprisoned and petitioned Parliament for a remedy, and a special bill was passed setting him free. 4 Henry VIII, c. 8. As Neale points out, this case "has no concern with the relations of the crown and the commons. The act concerning him asserts the obvious principle that an inferior court cannot punish members of a superior court for their actions in that court." *Id.*, at 160, n. 45. See also McIlwain, *supra*, at 219-223. More than 150 years later, when the Commons' functions had conflicted with the Crown's prerogatives and Parliamentary supremacy was established, the act was declared to be a general act. See note 14, *infra*.

that the free speech privilege was formalized into the Speaker's petition in 1541.[16] Yet even then the privilege went only as far as the jurisdiction of the House and through the reigns of Henry VIII and Elizabeth I afforded no protection for "licentious" discussion into matters involving the prerogatives of the Crown.[17]

The ever-increasing independence and legislative authority of the House of Commons was, however, an irreversible process, and cognizance was taken of matters heretofore reserved to the Crown's domain, such as the succession and the conduct of foreign wars. The House began to conceive of itself as the Grand Inquest of the Nation, demanding "a voice in the general policy of the country, and [the right] to criticize the action of the executive in modern fashion."[18] The consequent intrusion into the Crown's prerogative led to a century-long battle over freedom of speech, with the Tudor and Stuart monarchs claiming the right to interfere in Commons' debates and punish members for "seditious" and "licentious" speech. If the privi-

[16] Neale at 164-165. As Neale points out, when Parliament's initiative was by petition, there was no real threat to the wide powers of the Crown since the petition was only a request for a remedy and the king's response became the statute. The king could, of course, and often did, qualify the sense of the petition in his reply and thereby mold the statute. When, however, the bill procedure was introduced, the king's power of modification was eliminated and he could only assent to or veto the bill. The bill was thus the actual text of law enforceable in the courts and the veto was an unreliable weapon. Elizabeth tried, therefore, to reinstitute the old petition procedure, but did not succeed. The House, on the other hand, needed protection against more direct interference with their debates. *Id.*, at 170-172. Thus, the speech and debate petition did not arise independently of the change in Parliament's functions, but as a result of it.

[17] Neale at 164-165.

[18] 1 Anson, Law and Custom of the Constitution 34-35 (4th ed. 1909).

lege were to be maintained as an instrument of security for Parliament, a broader, absolute definition of the privilege, which would preserve the House's expanded jurisdiction, was essential.[19] This dispute over the scope of the privilege witnessed systematic harassment of members who dared criticize the Crown, with the King claiming that the privilege ended where his prerogatives began; and the House declaring that the privilege was absolute for any matter touching Parliamentary business.[20] The battle culminated when Sir John Eliot and other members who opposed funding a needless and bloody war overseas were

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[19] See *id.*, at 160-161:

> "The line taken by the Tudor and Stuart sovereigns on this question of freedom of speech shows that the House had to struggle not merely for latitude of discussion, but for the existence of its own initiative in legislation and in deliberation. The Crown maintained and the House denied that the Commons were summoned merely to vote such sums as were asked of them, to formulate or to approve legislation or topics of legislation submitted to them, and to give an opinion on matters of policy if, and only if, they were asked for one . . . ."

[20] The methods of intimidation employed by the Crown, and protested by Parliament as a breach of privilege, took a wide variety of forms. In addition to the institution of criminal proceedings, the Crown's arsenal also included issuing direct orders to the Speaker to cease debate on sensitive topics, bribing corruptible Members of Parliament, summarily arresting others and arraigning them before the Star Chamber or committing them directly to the Tower, and spreading rumors of Royal displeasure and threats of retaliation. See generally T. P. Taswell-Langmead, *English Constitutional History*, 318-321, 336-337, 541-579, 770-772 (4th ed. 1890).

Secret, inquisitorial bodies with contempt power—the equivalent of the modern-day investigating grand jury—also were used as instruments of harassment. For example, in 1575, Peter Wentworth was interrogated about his speeches by a special committee, composed of state ministers. When he refused to answer on the ground that he could not be questioned outside of Parliament, he was committed to the Tower for contempt. See Cella, *supra*, at 6-10; Taswell-Langmead, *supra*, at 490-494.

prosecuted in 1629 for making "seditious" speeches in the House.[21] The judges of the King's Bench rejected the plea of privilege by reverting to its earlier and limited applications as excluding "seditious" speeches.[22] The im-

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[21] Taswell-Langmead, *supra*, at 557-560, 578-579.

[22] *Proceedings Against Sir John Eliot, Denzil Hollis and Benjamin Valentine*, 3 How. St. Tr. 294. It is noteworthy that Eliot's counsel based his plea to the court's jurisdiction in a functional approach, arguing that the privilege applied even to speeches characterized as "seditious" because of the accusatory and inquiring functions of Parliament:

> ". . . The words of the speech themselves contain several accusations of great men; and the liberty of accusation has always been parliamentary . . . . So it is the duty of the commons to enquire of the Grievances of the subjects, and the causes thereof, and doing it in a lawful manner . . . [and] parliamentary accusation, which is our matter, is not forbidden by any law . . . .
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> "Members of the House may advise of matters out of the House: for the House itself is not so much for consultations, as for propositions of them." *Id.*, at 295, 296, 298.

He also relied on the judicial origins of the privilege:

> "Words spoken in Parliament, which is a superior court, cannot be questioned in this court, which is inferior." *Id.*, at 296.

In rejecting the plea, the judges addressed themselves *only* to the latter proposition. Justice Whitlocke said:

> "[W]hen a burgess of parliament becomes mutinous, he shall not have the privileges of parliament. In my opinion, the realm cannot consist without parliaments, but the behaviour of parliament-men ought to be parliamentary. No outrageous speeches were ever used against a great minister of state in parliament which have not been punished. If a judge of this court utter scandalous speeches to the state, he may be questioned for them before commissions of Oyer and Terminer, because this is no judicial act of the court." *Id.*, at 308.

And Chief Justice Hyde added:

> "As to what was said, that an inferior court cannot meddle with matters in a superior court; true it is . . . but if particular members of a superior court offend, they are oft-times punishable in an inferior court . . . ." *Id.*, at 307.

prisonment of Eliot and others crystallized opposition to the despotic rule of Charles I and was a significant factor leading to the Civil War and the execution of the King.[23] In 1641, the House of Commons declared the trial to be a breach of the speech and debate privilege,[24] and there followed a series of resolutions and acts by both Houses, before and following the Restoration, guaranteeing the privilege in the broadest terms.[25]

During this entire period of constitutional development, Parliament never defined the outer limits of its privileges with particularity. The free speech privilege was not a static concept or an end in itself, but an essential mechanism for the protection of the legislature's changing functions. Even prosecutions such as Eliot's would not have been condemned a century earlier; it was only when Commons seriously asserted its right as the Grand Inquest that "restrictions hardly noticed before were bitterly resented; and the illusion of freedom gradually vanished from men's

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[23] See Cella, *supra*, at 11-12:

> "This decision was extremely unpopular throughout the country. It was one of the most significant factors in the growing opposition to King Charles I and his policies. It made a lasting impression upon the House of Commons which never forgot this unwarranted invasion of their ancient rights, privileges and liberties."

See also *Tenney* v. *Brandhove*, *supra*, at 372; Wittke, *supra*, at 103-106.

[24] This resolution is reprinted in 3 How. St. Tr. 310-311. The year 1641 was the first opportunity for the House to invalidate Eliot's conviction and establish the absolute scope of the privilege since Charles I governed dictatorally without Parliament from 1630 until the Civil War. Taswell-Langmead, *supra*, at 600-606.

[25] For example, in 1667, both Houses resolved that the special act in *Strode's Case* was a general law. See 3 How. St. Tr. 314 *et seq.* In 1668, the House of Lords reversed the convictions of Eliot, Hollis and Valentine. Taswell-Langmead, *supra*, at 378, n. 55.

minds."[26] As the circumstances and need for the privilege were fluid, so, too, was the privilege itself; and, as Blackstone has observed, transient definitions would have been counter-productive:[27]

> "Privilege of parliament was principally established, in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown. If, therefore, all the privileges of parliament were once set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member, and violate the freedom of parliament. The dignity and independence of the two houses are therefore, in great measure preserved by keeping their privileges indefinite.

The functional approach to the privilege did not end with the Restoration, and there followed events of particular relevance to this case. By the time of James II's accession in 1686, the House of Commons asserted the right to publish its proceedings to the country at large as a corollary of its power to investigate misbehavior by the Executive. The King reacted bitterly and ordered the prosecution of Sir William Williams, Speaker of the House,

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[26] Neale, *supra*, at 175. In this regard, it is noteworthy that prior to the institution of the bill procedure and the expansion of Commons' jurisdiction, there were only three protests by the House respecting breach of the speech and debate privilege—*Hazey's Case* in 1399, *Young's Case* in 1455 and *Strode's Case* in 1521. See Wittke, *supra*, at 23-25.

[27] 1 Blackstone's Commentaries 164.

who, with permission of the House, had published and circulated a committee report, written outside of Parliament but introduced into the parliamentary records and then redistributed by Williams, which accused the King and his relatives and closest advisors of a plot jeopardizing the religious freedom of the country. The reaction to this prosecution in Parliament and the country at large was intense, and, as we shall discuss in detail, *infra*, 67-75, was the primary cause of the exile of James II and the passage of the Bill of Rights, which stated, in the broadest language:

> "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2.

Finally, as the fear of executive intrusion gradually lessened and the representative character of Parliament was enhanced by the democratic reforms of the late eighteenth century, the House removed its veil of secrecy[28] and recognized its obligation to inform the public fully of the workings of government. This in turn led necessarily, albeit after some dispute with the courts, to the extension of the free speech privilege to individual members who, with or without the permission of the House, circulated to the public reports of their speeches and other proceedings.[29] In this process, too, the privilege followed and then embraced the changing realities of the legislative function, at first to preserve the secrecy of legislative debates and later to in-

[28] Since 1641, a standing rule of the House of Commons had forbade individual members from publishing parliamentary proceedings. See II T. E. May, Constitutional History of England 34 (10th ed. 1891).

[29] This is discussed in detail in our brief, *infra*, section I.C.

sure the free flow of information from Parliament to the people.

3. *The Intent of the Framers.*

The framers of our Constitution were well aware of this history and of the necessity for a functional approach to the privileges of Congress. They consciously excluded certain privileges and limited others, which had derived historically from the judicial character of Parliament and had, or should have, fallen into desuetude.[30] The speech and debate privilege, however, was viewed as essential to republican government, as "an important protection of the independence and integrity of the legislature." *United States* v. *Johnson, supra,* at 178. Madison's motion in the Convention to delineate specifically this privilege was defeated,[31] and the language of the Constitution, therefore, was "framed in the broadest terms." *Id.,* at 182-193.[32]

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[30] See Jefferson, Manual of Parliamentary Practice, § 3. Thus, for example, the privilege of the legislature to keep its proceedings secret was barred by Article I, section 5, of the Constitution, which requires the publication of a journal. The unlimited privilege from arrest and civil process was severely curtailed in Article I, section 6. And Congress was not given a general privilege of the contempt power, for, as this court observed in *Kilbourn* v. *Thompson, supra,* at 183-189, this privilege obtained only in bodies of a judicial character.

[31] Cella, *supra,* at 14-15.

[32] Apparently recognizing that the Convention acted properly in rejecting his proposal for a static definition of the privilege, Madison later advocated the functional approach:

> "In the application of this privilege to emerging cases, difficulties and differences of opinion may arise. In deciding on these the reason and necessity of the privilege must be the guide." 4 Writings of James Madison 221 (Hunt ed. 1910).

A functional interpretation of the privilege is also necessitated by a unique purpose for it which was not present in England. "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States* v. *Johnson, supra,* at 178. This purpose would be vitiated, and the "practical security" which the Clause is designed to afford, *id.,* at 179, would be rendered a rhetorical abstraction, if the courts construe the Clause in its narrowest historical setting. This conclusion follows inescapably from this basic purpose of the Clause in our scheme of government, as stated early in our history by James Wilson:

> "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense." I Works of James Wilson 421 (McCloskey et. 1967).[33]

And this Court has made it perfectly clear that the "powerful" of whom Wilson spoke refers primarily to the executive branch. *United States* v. *Johnson, supra,* at 181-182.

The content of the Clause cannot, therefore, be frozen to the burgesses of five hundred years ago, or to the events leading to the execution of Charles I, or even to conditions prevalent in 1787. As an effective instrument of separation of powers, the Clause must be shaped, as it always

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[33] Quoted in *Tenney* v. *Brandhove, supra,* at 373.

has been,[34] by the present-day functions of Congress in our system of representative government, and must protect against intrusions by the executive and judiciary which "threaten those *consequences* which the Framers deeply feared." Cf. *School District of Abington Township, Penn.* v. *Schempp*, 374 U.S. 203, 236 (1963) (Brennan, J., concurring) (emphasis added). In this regard, we cannot improve on Cella's cogent analysis:

> "If the doctrine of legislative privilege is to perform its traditional function in our system of separation of powers of permitting legislators to carry out their increasingly onerous responsibilities without fear of prosecution or harassment from the executive and judicial branches, then it must be applied broadly and liberally to effectuate its intended purpose. In its application, it must be geared to the realities of the manner in which a modern legislative system operates. It cannot afford to be permanently attached to the ways in which legislatures discharged their responsibilities when the Republic was founded or, for that matter, even fifty years ago.
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> "Modern legislatures have had to adopt their techniques of operation to the increasingly complex society within which they must function. New techniques and new methods of procedure have gradually evolved. The doctrine of legislative privilege cannot remain

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[34] The evolutionary and functional nature of legislative privilege was also present in the American colonies. See generally M. Clarke, the Parliamentary Privilege in The American Colonies (1943). For example, given the historical setting it is not surprising that the Speakers Petition in all of the colonies claimed the right of access to the colonial governor at all times and demanded that he should not take cognizance of their proceedings except as was revealed in formal reports; and other privileges developed according to local needs. See *id.*, at 70-82, 227-234.

"static if it is to remain meaningful." *Cella, supra,* at 34.

In sum, there is no warrant in English history, or the prior decisions of this Court, or in the historical application of the Clause, or in the purposes for its inclusion in the Constitution, to warrant the narrow approach taken by the Court of Appeals.[35] The very opposite is true: the free speech privilege evolved in a functional manner to give practical security to legislators who criticize the administration of domestic and foreign policy by the Executive. The facts giving rise to this case fall within the mainstream of the historical purposes for the privilege.

In the section which follows, we shall show that the publication of committee reports is commonly done in Congress and performs an important function in representative government. And when, as here, the report involved is critical of executive conduct, its publication and distribution to the people is a classic example of the well-recognized "informing function" of Congress. This, combined with fundamental principles of separation of powers, require that such publication be privileged legislative activity.

A considerable amount of illumination is also provided by examining the intent of the framers, for there is sub-

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[35] The arbitrary line drawn by the Court of Appeals at the deliberative process of Congress, does have the apparent virtue of being applied easily to any state of facts. We submit that the price for this line—jeopardizing the independence and integrity of Congress—is far too high. Moreover, even this apparent simplicity of operation is deceptive. The court noted, and did not dispute, our argument that "communicating with the electorate is essential to effective deliberation because it elicits responses to guide (a Congressman's legislative decisions and because it helps to put pressure upon other legislators." (P.W.C. 9a & 10a.) It simply dismissed the argument as "staggering." (*Ibid.*)

stantial evidence that they intended to immunize from executive and judicial inquiry—and specifically from inquiry by the grand jury—all forms of communication between a congressman and the public in the exercise of the informing function. This material is set out in section I.C. In section I.D. following that, we trace the precise historical development in England on this issue, showing that the immediate purpose of the inclusion of the privilege in the English bill of rights was to reverse a judicial decision holding publication of committee reports to be outside the privilege. We also examine in that section subsequent English judicial decisions establishing that the publication of speeches and reports by members of Parliament is privileged from judicial inquiry.

B. The Publication of Committee Records is Generally Done by Congressmen and is Essential to the Proper Functioning of Representative Government.

In considering whether any given practice falls within the functional standards established in previous cases, it is of course obvious that the privilege against inquiry does not extend to all of a congressman's actions simply because of his status. Clearly, for example, crimes such as assault and battery, armed robbery and bribery are beyond the scope of the privilege, even if fortuitously committed within the walls of the Capitol. See *United States* v. *Johnson, supra.*[36] Two benchmarks are implicit in

[36] It is, of course, possible that in such cases the privilege might operate to bar the admissibility of evidence concerning a congressman's "legislative acts . . . [and] his motives for performing them." *United States* v. *Johnson, supra,* at 185. See also *Ex parte Wason,* L.R. 4 Q.B. 573 (1868). In this sense, the speech and debate privilege would operate testimonially, in a manner akin to the privilege against self-incrimination of the attorney-client privilege.

past decisions. First, the court should ask whether the practice in question is necessary to fullfill any of the goals of representative government as established by the Constitution. Second, guidance is available in the actual workings of Congress to determine whether a practice is widely utilized by members of Congress in the performance of their duties; in other words, whether it is "generally done . . . by . . . its members in relation to the business before it."

1. *The Informing Function.*

It is clear that the publication of speeches and committee records about the workings of government and their dissemination to the electorate meets each of these criteria. The scheme of representative government envisaged by the Constitution presupposes an obligation on the part of a legislator to inform his constituents and colleagues about vital matters concerning the administration of government. This Court recognized the central importanee of this informing function in contrasting it with exposure for exposure's sake:

> "We are not [here] concerned with the power of Congress *to inquire into and publicize corruption,* maladministration or inefficiency in agencies of the Government. That was the only kind of activity described by Woodrow Wilson in *Congressional Government* when he wrote: 'The informing function of Congress should be preferred even to its legislative function.' *Id.*, at 303. *From the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature.* See Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 168-194." *Watkins* v. *United*

States, 354 U.S. 178, 200, fn. 33 (1957). (Emphasis added.)

The informing function plays a key role in our system of separation of powers, for it insures that the administration of public policy by the innumerable non-elected officials of the executive department is fully understood by the legislature and the people. As Woodrow Wilson wrote in his classic study of Congress:

> "It is the proper duty of a representative body to look diligently into every affair of government *and to talk much about what it sees.* It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; *and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct.*" (Emphasis added.) W. Wilson, Congressional Government, 303 (1885).

In contemporary times, as much as when the Constitution was written, the informing function acts to preserve the basic character of our constitutional government. Departing drastically from the theories of government in Europe, the framers believed that ultimate power must always rest in the people. As Madison, who is appropriately called the Father of the Constitution, said: "The people,

not the government, possess the absolute sovereignty."[37] For this system to be viable, the people must be informed fully of the workings of government so that they may be able meaningfully to exercise their constitutional rights to vote intelligently and to the "free public discussion of the stewardship of public officials."[38] This necessarily imposes a *duty* on congressmen to inform the electorate for, to borrow again from the language of Woodrow Wilson:

> "The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration . . .
>
> "Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body (Congress) which kept all national concerns suffused in a broad daylight of discussion." Wilson, *supra*, at 303, 297.

The centrality of the informing function to democratic institutions has been emphasized even by those political theorists who, while doubting the capacity of legislative bodies to legislate; nonetheless believed that by overseeing the administration they would make an essential contribution to the protection of liberty:

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[37] IV Eliot's Debates 569 (1800). See also I Works of James Wilson 310 (McCloskey ed. 1967):

> "The order of things in Britain is exactly the reverse of the order of things in the United States. Here, the people are the masters of the government; there, the government is the master of the people."

[38] *New York Times* v. *Sullivan*, 376 U.S. 254, 275 (1964).

"The proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable; to censor them if found condemnable . . . . This is surely ample power, and security enough for the liberty of the nation." J. S. Mill, On Representative Government 42 (London: Longmans, Green, Reader and Dyer 1878).

It has been fortunate for the country that, as this Court noted in *Watkins, supra,* congressmen have always "assiduously performed" this kind of informing function. In the article there cited by the Court, Dean Landis reviewed Congress' historic exercise of this obligation in investigating and exposing bad judgment and corruption in the executive branch.[39] Perhaps more than any example of investigation and publicity discussed by Dean Landis, a member of Congress who informs the electorate and the rest of Congress about the process by which the Executive took

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[39] And Dean Landis emphasized this function as an inherent part of the legislative process in representative government:

"[The Congressman's] duty is to acquire [knowledge about administration], partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge. The electorate demands a presentation of the case . . . . The very fact of representative government thus burdens the legislature with this informing function . . . .

". . . That duty, however, is not distinct from the legislative process, but implied and inherent in it." Landis, *supra,* at 205-206 & n. 227.

the nation into a controversial war is engaging in legislative activity in the most classic sense of the term.[40]

On a broader plane, the publication of congressional committee proceedings and their dissemination to the electorate play other important roles in representative government. The heart of representative democracy is the communicative process between the people and their agents in government. By making widely available accurate reports of these proceedings, congressmen enlighten the electorate and at the same time insure that the people will inform them and their colleagues of their well-considered views on pending or potential legislation. Practically every careful student of Congress has observed this process and has noted as well that committee hearings and the publication and distribution of speeches and committee reports form the principal avenue for achieving it.[41] They thus agree with Harold Laski that:

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[40] It is certainly relevant in this regard that although the war in Vietnam was never declared by Act of Congress, there is a considerable constitutional dispute as to whether Congress nevertheless authorized it and/or knowingly acquiesced in it.

[41] See, *e.g.*, C. L. Clapp, The Congressman: His Work as He Sees It (1963) (Clapp was then head of the Governmental Studies Staff of Brookings):

"The principal educational tools of the congressman are his newsletter, radio and television programs, speaking engagements, and letters in response to constituent correspondence. There is considerable concern within the Congress that the general public is not well informed regarding the way the legislative body functions, and some members consciously seek to educate their districts in this area as well as about specific public issues." (P. 100.)

"Hearings also inform the public and interested groups that a particular measure is under consideration, thus providing the voters with an opportunity to make their wishes known in advance of congressional action. In making this point one Congressman said: 'the hearings serve a very useful purpose because, as a whole, they are open hearings, covered by mem-

"A legislature can criticize, it can ventilate grievances; its power to investigate through committees is

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bers of the press and given considerable publicity. They constitute one of the few places where any publicity goes out over over the country that a bill is moving along. By *informing* people that bill has reached the point of hearings, correspondence is stimulated before you reach a vote on it.' " (P. 265.) (Emphasis in original.)

"Indeed, although some congressmen consciously pursue the 'educator' role more actively than others, there are few who do not in some measure seek to enlighten the people they represent." (P. 101.)

J. Bibby and R. Davison, On Capitol Hill (1967), (Bibby is a professor at the Univ. of Wisconsin, and Davison is a professor at Dartmouth):

"The activities of Congress are 'news' and Congress is a prime subject for national news media coverage. Because of this capacity to generate publicity, Congress performs the functions of *Public education*. That is, Congress through its deliberations informs the public on issues and raises the level of public interest in current problems. With its well-publicized committee hearings and floor debates and the press releases that constantly flow from members' offices, there are few matters that do not receive congressional publicity. Often the publicity surrounding congressional activities has helped crystallize public opinion on issues and has thus facilitated the passage of new legislation . . . .

"Congress is thus more than an object of public opinion. Its relation to the electorate is reciprocal. Influenced by the voters, it is also constantly engaged in current issues and in influencing public thinking." (P. 13.) (Emphasis in original.)

J. P. Harris, Congress and The Legislative Process (1967) (Harris is Professor of Political Science, University of California at Berkley):

"The informing function is performed today largely through committee hearings on important legislative proposals and through congressional investigation . . . it is the proceedings of the major committees rather than the floor debates that attract greatest attention." (P. 41.)

E. S. Griffith, Congress: Its Contemporary Role (1956) (Griffith was then Director of the Legislative Reference Service):

"The political education of the public is one of the recognized functions of Congress." (P. 185.)

invaluable; and, not least, as it fulfills these tasks it provides a process of public education which is pivotal

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"More frequently than not such political education is a by-product rather than the chief end of Congressional behavior. The chief ends remain: to put through a policy or program, to solve a problem, and to be re-elected. The education of the electorate is chiefly valued as it contributes to one of these, but regardless of whether or not it is consciously sought, it nevertheless takes place continuously." (P. 185.)

"Second only to the publicity attending floor debate is that accorded the committee hearings .... To the serious student, the records of the hearings are mines of information. Here are set out in detail, and subjected to cross-examination, much of the basic data relating to the nature of the economy, the underlying factors in foreign relations, the future of our resources, the strategy of national defense, the problems in labor relations, and many another field of importance and interest ... a number of the committees deliberately plan some of their hearings with the education of the public in mind and choose subjects and witnesses accordingly." (Pp. 186-187.)

"There is high hope that this particular function of Congress of political education will continue to be performed, as it has been of late, with increasing responsibility, intelligence, and effectiveness. It lies near the heart of the democratic way." (P. 189.)

The Reorganization of Congress, a Report of the Committee on Congress of the APSA (1945):

"The other three functions of Congress today are exercised, in one manner or another, every day it is in session. They are: 1. The legislative function .... 2. The public opinion function —to reflect, express, and with the aid of the press, to inform and guide public opinion on the great issues of the day. With the decline of Congress as an original source of legislation, this function of keeping the government in touch with public opinion and of keeping the public opinion in touch with the conduct of government becomes increasingly important. Congress no longer governs the country; the Administration in all its ramifications actually governs. But Congress serves as a forum through which public opinion can be expressed, general policy discussed, and the conduct of governmental affairs exposed and criticized." (Pp. 13-14.)

This view is shared by analysts on all parts of the political spectrum. Compare, *e.g.*, Laski, *supra*, with J. Burnham, Congress

to democratic government." The American Presidency, quoted in R. Bolling, House Out of Order 29 (New York, E. P. Dutton Co. 1965).

Also, in examining what is "generally done" in Congress, it is pertinent to note that congressmen understand both the utility and necessity of holding committee hearings and publishing their proceedings in order both to enlighten the electorate and affect future legislation.[42] Congress has, accordingly, provided a variety of financial and

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and the American Tradition 233-234 (1959). See also D. Truman, The Governmental Process 372-377 (1951):

And Walter Bagehot observed the same process at work in the House of Commons:

> "The third function of Parliament is what I may call preserving a sort of technicality even in familiar matters for the sake of distinctiveness—the teaching function. A great and open council of considerable men cannot be placed in the middle of a society without altering that society. It ought to alter it for the better. It ought to teach the nation what it does not know.
>
> "Fourthly, the House of Commons has what may be called an informing function . . . . Since the publication of the Parliamentary debates a corresponding office of Parliament is to lay these same grievances, these same complaints, before the nation, which is the present sovereign. The nation needs it quite as much as the King ever needed it . . . . Any notion, any creed, any feeling, any grievance which can get a decent number of English members to stand up for it, is felt by almost all Englishmen to be perhaps a false and pernicious, but at any rate possible—an opinion to be reckoned with. And it is an immense achievement." The English Constitution 152-153 (1963).

[42] See, *e.g.*, *Clapp, supra,* at 89-100, containing interviews with a cross section of congressmen; K. G. Olsen and C. E. Bennett, The Service Function of the United States Congress, in Congress: The First Branch of Government 345-353 (1969); V. Hartke, You and Your Senator, 202, 233-234 (1970); W. L. Marrow, Congressional Committees 163-165 (1969); D. G. Tacheron and M. K. Udall, The Job of a Congressman 117, 280-288 (1966).

other support for communications between a legislator and the public.[43] One study revealed that a majority of congressmen send newsletters to the public on a periodic basis,[44] and it has also been found that congressmen spend a substantial portion of their time in informing the electorate.[45]

The informing function is a fact of life in the modern Congress, and it surely cannot be dismissed cynically as a mere device for congressmen to woo votes. Many congressional hearings have been held and massively publicized in order to enlighten the electorate about activities which were inimical to the general welfare and resulted in public pressure for the consequent passage of important legislation. A small sample might include the famous in-

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[43] "Such provisions include the franking privilege for sending letters, the telephone and telegraph allowance, the stationery allotments, use of the Joint Senate-House Radio-Television facilities, free distribution of the Congressional Record, favorable prices on personal reprints from the Record, and free use of the folding rooms which collate, fold, stuff, package and mail Congressional newsletters, polls, and other communications directed to constituents." C. F. Hawver, The Congressman's Conception of His Role 59 (1963). See also Clapp, *supra*, at 59-60, 89; J. Harris, *supra*, at 202, 234.

[44] "In 1962 a confidential House survey showed that 231 of 437 members of the House used franked-mail newsletters, mailed weekly or on another periodic basis. Of the 231, some 15 Congressmen sent out 400,000 or more pieces of free mail each during the first seven months of the year while 19 sent out 300,000 to 400,000 pieces . . . . In the middle range, well scattered between 30,000 and 300,000 pieces, were 168 (about 73%), while only 29 sent out 5,000 pieces or less." Hawver, *supra*, at 56. The Post Office has reported that the amount of franked mail increased from 44.9 million pieces in 1955 to 63.4 million in 1958 and 111 million in 1962. Clapp, *supra*, at 59.

[45] See, *e.g.*, the results of congressional surveys in Tacheron and Udall, *supra*, at 280-288; Olsen and Bennett, *supra*, at 351-353.

quiries conducted by the Kefauver committees on organized crime and on dangerous drug practices, by the O'Mahoney committee on the concentration of economic power, by the Senate rackets subcommittee on the regulation of internal operations of labor unions, by the La-Follette civil liberties committee, by the 1966 Senate committee hearings on automobile safety, and by the Fulbright committee on the Reconstruction Finance Corporation.[46] With respect to investigations of executive conduct, one might add the Wheeler-Walsh exposure of scandal in the Harding administration,[47] the Truman-Mead hearings on national defense and, of course, many more recent hearings on the origins and conduct of the Vietnam War.[48] The value of congressional investigations and the publicity they generate was stated in powerful terms by Senator (later Mr. Justice) Hugo Black, who was catapulted into national prominence by his exposures of corruption in the utilities lobby and maladministration of the merchant marine:[49]

> "They have formed the basis of our most important legislation . . .
>
> "But most valuable of all, this power of the probe is one of the most powerful weapons in the hands of

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[46] See generally Harris, *supra*, at 4, 233; Bibby and Davison, *supra*, at 13.

[47] See Frankfurter, Hands Off the Investigators. The New Republic, May 21, 1924, at 329-331.

[48] For example, the Fulbright hearings in 1966 were not only televised in their entirety but later printed privately and distributed widely to the public. See n. 111, *infra*.

[49] See Frank, Hugo L. Black, in 3 Justices of the Supreme Court 2328-2329 (Friedman & Israel ed. 1969). Of the latter investigation, Nicholas Johnson wrote: "He stimulated the nation's conscience, creating demand for Congressional maritime reform." Senator Black and The American Merchant Marine, 14 U.C.L.A. L. Rev. 399 (1967).

the people to restrain the activities of powerful groups who can defy every other power.

"Public investigating committees, formed by the people themselves or from their public representatives, exist always in countries where the people rule . . . that is because special privilege thrives in secrecy and darkness and is destroyed by the rays of pitiless publicity." Black, Inside a Senate Investigation, 172 Harper's Monthly 275, 285-286 (Feb. 1936).

An examination of the operations of Congress, therefore, settles beyond doubt that the informing function, effectuated in large part by the publication of speeches and committee records, is activity which is "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn, supra,* at 204, and is clearly "related to the due functioning of the legislative process," *United States* v. *Johnson, supra,* at 182.[50] And it thus falls within the protection of the Speech or Debate Clause.[51]

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[50] The publication and widespread circulation of committee reports is often accomplished with the assistance of private printers. See pp. 85-88, *infra.*

[51] In light of a misconception by the Court of Appeals (P.W.C. 9a), we wish to reiterate that we do not urge and never have urged that simply because a number of congressmen are said to engage in a certain kind of conduct it necessarily follows that the conduct is within the ambit of the clause. For example, intervening before an executive agency, on behalf of a constituent, with respect to a matter pending before it for decision is not privileged. See *United States* v. *Johnson, supra,* at 179. Such conduct is not necessary to fulfill any goal of representative government since it involves a matter committed by law to a coordinate branch of government for determination. Moreover, it is not customarily done—at least not to the same extent as the informing function, inasmuch as many congressmen believe such conduct to be improper and refuse to engage in it. *Galloway, supra,* at 202-205.

A similar functional analysis led this Court to hold in *Barr* v. *Matteo*, 360 U.S. 564 (1959) and *Howard* v. *Lyons*, 360 U.S. 593 (1959), that the judicially-created doctrine of executive privilege protects the issuance and widespread circulation of news releases by the thousands of subordinate officials of the executive department. The Court there held, applying a functional approach, that while such activity was not statutorily mandated it was nonetheless customarily done and related to the duties of the office:

> "It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty. That petitioner was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank . . . where the concept of duty encompasses the sound exercise of discretion." 360 U.S. at 575. (Emphasis in original.)

And Mr. Justice Black concurred on the ground that the public had a right to be informed about the operation of agencies:

> "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of the government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends,

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Very few congressmen go beyond sending a letter of inquiry to the agency. Of course, if a congressman believes that an injustice has been done by an agency, he has adequate legislative tools at his disposal—he may hold hearings, expose the injustice, and propose legislation.

of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important." *Id.*, at 577.

This reasoning, of both the majority[52] and concurring opinions, applies with even greater force to the privileges of elected members of Congress, which derive from the Constitution itself. And congressmen *are required*, in the constitutional sense, to speak out and enlighten the electorate.

2. *The Separation of Powers Context of this Case.*

The issue of the degree to which the informing function of Congress is encompassed within the scope of the Speech or Debate Clause is presented herein with striking clarity. What is now before this Court is a classic separation of powers case. There is no claim here, in contrast to some civil cases, that a member of Congress used the authority of his office to violate willfully an individual's constitutional rights. That kind of situation draws into play the obligation of the courts to protect individual rights, and there may very well be circumstances where no other means is available to safeguard the preferred constitutional rights of the individual, and where the judiciary will therefore be compelled to draw the balance on the side of the individual. Cf. *Hentoff v. Ichord*, 318 F. Supp. 1175 (D. D.C. 1970); *Doe* v. *McMillan*, F. 2d (D.C. Cir. 1972) (dissenting opinion).

In this case, on the other hand, the judiciary is not being asked to balance the rights of individuals, including pre-

[52] Mr. Justice Stewart joined in this analysis but did not agree that there was any factual support for any conclusion other than that Barr was seeking merely to defend his own reputation. *Id.*, at 586.

ferred constitutional rights, against the privileges of members of Congress; to the contrary, the executive branch of government has come to the courts, seeking the aid of the courts' compulsory process and resulting contempt power, and claimed that it may determine what a member of Congress may tell his constituents about matters of overwhelming public concern. It is no exaggeration to say that this claim of the executive branch challenges the fundamental character of our tripartite system of government.

The constitutional evil which would result from denying the privilege's applicability to the informing function of Congress is magnified when this is done at the behest of the Executive and with respect to material which is critical of executive behavior. As this Court has emphasized, the central purpose of the Speech or Debate Clause is "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States* v. *Johnson, supra,* at 181. If the executive branch may, at will, institute grand jury proceedings and interrogate witnesses about Senators' publications of their speeches and committee reports which they send to the electorate, it will possess the power to isolate effectively all but the most courageous legislators from their constitutents. If such a rule applies, congressmen will have to watch what they say to the people—in press releases, newsletters and anything spoken outside of the four walls of the Capitol—and they will inescapably be inhibited out of fear of harassment, grand jury inquisitions and even prosecutions. Yet if the Speech or Debate Clause means anything, it is that courts and prosecutors are not referees over what congressmen may say to the people or how they may say it.

The Court of Appeals believed that the "consequences" of acknowledging the right of congressmen to inform the electorate would be "staggering" and, in support of this proposition, hypothesized a series of strained examples of

possible abuse. (P.W.C. 10a.) It is clear that the hypothetical possibility of abuse of congressional power "affords no ground for denying the power." *McGrain* v. *Daugherty*, 273 U.S. 135, 175 (1927).

The cogent answer to this sort of "parade of horribles" argument[53] was given by Mr. Justice Harlan in *Barr* v. *Matteo, supra*, at 576:

> "We are told that we should forbear from sanctioning any such rule of absolute privilege lest it open the door to wholesale oppression and abuses on the part of unscrupulous government officials. It is perhaps enough to say that fears of this sort have not been realized within the wide area of government where a judicially formulated absolute privilege of broad scope has long existed. It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. . . . We think that we should not be deterred from establishing the rule which we announce today by any such remote forebodings."

This reasoning supported the extension of the executive privilege to all forms of utterences, including publication and distribution of news releases, even through thousands of diverse, subordinate and non-elected officials were cov-

[53] The framers, who gave congressmen the power to set their own salaries, seemed to have more faith than the Court of Appeals that Congressional power would not be perverted for commercial gain.

ered. It would seem, *a fortiori*, to govern the scope of the constitutional privilege of elected members of Congress. It is appropriate, in this regard, to recall Mr. Justice Holmes' famous statement in *Missouri, Kentucky & Texas Ry. Co.* v. *May*, 194 U.S. 267, 270 (1904):

> "[I]t must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Moreover, the Court of Appeals' hypothetical approach may be compared with *Hearst* v. *Black*, 87 F. 2d 68 (D.C. Cir. 1936), where the plaintiff filed a complaint alleging that personal telegrams had been seized illegally and were to be exposed to the general public by a Senate committee. The Court dismissed the complaint on the principles of separation of powers. It is noteworthy that the defendant in that case was Senator (later Mr. Justice) Hugo Black, who was seeking to expose corruption in the utility lobbies and their bribery of newspapers, including the plaintiff Hearst Publishing Co., for which acquisition and publicity of these telegrams were essential. Yet if the Court of Appeals' theory in this case were correct, Hearst could have successfully harassed Senator Black in a court proceeding by merely alleging illegal acquisition and thereby hindered the investigations. Thus, in considering the parade of horribles, it is appropriate to quote the wise statement of Judge Learned Hand in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (2d Cir. 1949):

> "[I]f it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all

officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

This certainly applies with equal force to the constitutional privilege of congressmen, who are "to be protected from the resentment of everyone, however powerful," I Works of James Wilson, *supra*, at 421, particularly the executive branch, *United States* v. *Johnson, supra*, at 181. Finally, in the unlikely event that a member of Congress does engage in such reprehensible conduct as hypothesized by the Court of Appeals, he *will* be held accountable—by the House and by the people at the polls. What Mr. Justice Frankfurter said in *Tenney* v. *Brandhove, supra*, at 378, is directly on point to this case:

> "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."

C. The Framers Intended that the Clause would Operate as a Bar against Executive and Judicial Inquiry into a Congressman's Communications to the Electorate.

1. *The Cabell Grand Jury Investigation and Jefferson's Protest.*

There is substantial evidence that the privilege of the Speech or Debate Clause was intended by the framers to

protect from inquiry by the executive and judicial branches, including the grand jury, *all* communications from a congressman to his constituents. This was certainly the view expressed unambiguously by Thomas Jefferson and James Madison, two of the architects of our Constitution, with respect to an event which is practically indistinguishable from the case at bar. In 1797, a federal grand jury in Virginia investigated the conduct of several members of Congress, including Congressman Cabell of Virginia, in sending newsletters to their constituents critical of the administration's policy in the war with France. The administration believed the newsletters to be "seditious," to contain information valuable to the enemy, and to threaten the security of the Nation.

The grand jury reported:[54]

> "We, of the grand jury of the United States, for the district of Virginia, present as a real evil, the circular letters of several members of the late Congress, and particularly letters with the signature of *Samuel J. Cabell,* endeavoring, at a time of real public danger, to disseminate unfounded calumnies against the happy government of the United States, and thereby to separate the people therefrom; and to increase or produce a foreign influence, ruinous to the peace, happiness, and independence of these United States."

Thomas Jefferson, who was the Vice-President of the United States and the leading contemporary expert on congressional privilege,[55] immediately drafted a long essay, in the form of a protest to the Virginia House of Dele-

[54] 8 Works of Thomas Jefferson 325 (Ford ed. 1904).

[55] While Vice President, Jefferson compiled the authoritative Manual on Parliamentary Practice.

gates signed by himself and other leading citizens of the district represented by Cabell, condemning the grand jury's investigation as a blatant violation of the congressional privilege and of the doctrine of separation of powers. The draft was forwarded to Madison who joined in it and suggested certain minor changes.[56] These changes were then adopted by Jefferson and the protest was sent to the House of Delegates. This eloquent protest bears so directly on the present case that we believe it merits quotation at unusual length. Its significance goes beyond even the stature of its authors and the factual identity with the case at bar; this protest, line by line, is the most cogent analysis in existence of the purposes and scope of the Speech or Debate Clause, as well as the limitations the Clause places on grand jury investigations. The protest is as follows:[57]

> ". . . that in order to give to the will of the people the influence it ought to have, *and the information which may enable them to exercise it usefully,* it was a part of the common law, adopted as the law of this land, *that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive;* and *that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any*: that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the

[56] Letter from Madison to Jefferson, August 5, 1797, in Presidential Papers Microfilm, James Madison Papers, Series I: 1796 Jan. 5—1801 June 14 (Library of Congress).

[57] 8 Works of Thomas Jefferson 322-331 (Ford ed. 1904).

proceedings of the legislature have been known to be arrested and suspended at times until the Representatives could go home to their several counties and confer with their constituents.

"That when circumstances required that the ancient confederation of this with the sister States, for the government of their common concerns, should be improved into a more regular and effective form of general government, the same representative principle was preserved in the new legislature . . . and the laws and principles remained unaltered which privileged the representative functions, whether to be exercised in the State or General Government, against the cognizance and notice of the co-ordinate branches, Executive and Judiciary.

". . . that the said Samuel Jordan Cabell accepted the office, repaired at the due periods to the legislature of the General Government, exercised his functions there as became a worthy member, and as a good and dutiful representative was in the habit of corresponding with many of his constituents, and communicating to us, by way of letter, information of the public proceedings, of asking and receiving our opinions and advice, and of contributing, as far as might be with right, to preserve the transactions of the general government in unison with the principles and sentiments of his constituents: that while the said Samuel J. Cabell was in the exercise of his functions as a representative from this district, and was in the course of that correspondence which his duty and the will of his constituents imposed on him, the right of thus communicating with them, deemed sacred under all the forms in which our government has hitherto existed, never questioned or infringed even by Royal judges or governors, was openly and directly violated at a Circuit

court of the General Government, held at the city of Richmond, for the district of Virginia, in the month of May of this present year, 1797 . . . .

. . . . . .

"That the grand jury is a part of the Judiciary, not permanent indeed, but in office, *pro hac vice* and responsible as other judges are for their actings and doings while in office: *that for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation* . . . is to do away the influence of the people over the proceedings of their representatives by excluding from their knowledge, by the terror of punishment, all but such information or misinformation as may suit their own views; *and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the Executive*:

". . . and finally, is to give to the Judiciary, and through them to the Executive, a complete prepondererance over the legislature rendering ineffectual that wise and cautious distribution of powers made by the

constitution between the three branches, and subordinating to the other two that branch which most immediately depends on the people themselves, and is responsible to them at short period." (Emphasis added.)

Jefferson's protest ended with a petition that the House of Delegates order the arrest and imprisonment of the grand jurors for this "great crime, wicked in its purpose, and mortal in its consequences," which not only jeopardized Cabell personally, but infringed the rights of the public.[58] In adding his complete agreement, Madison stated:[59]

> "It is certainly of great importance to set the public opinion right with regard to the functions of grand juries, and the dangerous abuses of them in the federal Courts; nor could a better occasion occur."

2. *The View of Other Framers.*

The object of their petition was to mobilize public opinion; the more drastic action urged in the petition became unnecessary since the grand jury withdrew the presentment.[60]

Other founders shared Jefferson's view that the free speech privilege prohibited intrusions by the executive and judicial branches into communications by a congressman to the electorate about matters of public concern. James Wilson, "an influential member of the committee on de-

[58] 8 Works of Thomas Jefferson 331 (Ford ed. 1904).

[59] Letter from Madison to Jefferson, *supra*, n. 56.

[60] See Koch and Ammon, The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties, V William & Mary Quarterly (Third Series) 152-153 (1948); J. M. Smith, Freedom's Fetters 95 (1956).

tail,"[61] stated the reason for the speech or debate privilege as enabling a representative of the public "to discharge his public trust" and to "be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense." I Works of James Wilson, 421 (McCloskey ed. 1967), quoted in full, *supra*, p. 33.

Wilson believed firmly that part of the "discharge of his public trust" was the right of a legislator to communicate with the people. In the Essays on the Constitution, Wilson said:

> "Representation is the chain of communication between the people and those to whom they have committed the exercise of the powers of government. The chain may consist of one or more links, but in all cases it should be sufficiently strong and discernible." II. Eliot's Debates, 424 (1788).

And, to Wilson, this placed an obligation on congressmen to inform the people fully about proceedings in the Congress:

> "That the conduct and proceedings of representatives should be as open as possible to the inspection of those whom they represent, seems to be, in republican government, a maxim, of whose truth or importance the smallest doubt cannot be entertained. That, by a necessary consequence, every measure, which will facilitate or secure this open communication of the exercise of delegated power, should be adopted and patronised by the constitution and laws of every free state, seems to be another maxim, which is the unavoidable result of the former." I Works of James Wilson, 422 (McCloskey ed. 1967).

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[61] *Tenney* v. *Brandhove, supra,* at 313.

Wilson's statements are characteristic of a consistent theme of the framers that our system is one of self-government and can operate effectively only when the people are given full information about what their agents in government are doing; a necessary corollary of which is that congressmen must "look diligently into every affair of government and talk much about what [they] see."[62] Madison thus believed:[63]

> "Knowledge will forever govern ignorance. And people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."

And also, that ". . . the right of freely examining public characters and measures, and of free communication thereon, is the only effective guardian of every other right." 6 Writings of James Madison, 398 (Hunt ed. 1906).

The framers were writing against the background of the experience of the English people, who for the last two centuries had been battling for increased control over their government and had finally, shortly before the Declaration of Independence, won the right to have the debates in Parliament published.[64]

In addition, the framers were appreciative of the effects on public opinion and on government caused by the publicizing of debates in the colonial assemblies. Following

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[62] W. Wilson, Congressional Government 303 (1885), quoted *supra*, p. 38.

[63] Quoted in Lasswell, National Security and Individual Freedom 62-63 (1950). See also 4 Papers of James Madison 236-237 (Hutchinson ed. 1965).

[64] See generally 1 Anson (Law and Custom of the Constitution 158 *et seq.* (3d ed. 1897); May, Constitutional History of England.

the practice of the House of Commons, the colonial assemblies had early enjoined their members from reporting their proceedings so as to preserve secrecy of operation from the Crown, or, in their situation, the Crown-appointed governors. See *Clarke, supra*, at 227-234. However, beginning around 1760, several of the assemblies repealed their secrecy rules and opened their proceedings to the public. The immediate effects in one important state, Massachusetts, have been described as follows:

> "By exposing its debates to the public, the assembly offered itself to the people as an agent of public opinion far more direct and immediate than could have normally been the case before. But its action also proceeded in the reverse direction—towards the public. The publicity of debates excited interest and accentuated the sense of crisis. The members, while framing their bold policies of resistance, challenged the people to support them. The immediate public was that of Boston: and this was of no small significance, since it was the Boston mob which executed the most provocative acts of violence and resistance, which could terrorize reluctant representatives from country towns, and whose hearts and minds could so effectively be stirred to mutiny and rage." J. R. Pole, Political Representation in England and the Origins of the American Republic, 70-71 (London: MacMillan, St. Martin's Press, 1966).

3. *The Publication Requirement of Article I, Section 5.*

A confluence of these factors—rooted both in history and political theory—convinced the framers that the obligation of Congress to inform the public should be declared in the Constitution. In order to prevent Congress from ever imitating the ancient practices of the House of Commons and

enacting a standing rule against publication, the Constitution requires, in Article I, section 5, that:

> "Each House shall keep a Journal of its proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal."

Clearly, the reason for this publication requirement was, not so much for the benefit of the members themselves, but to insure that congressmen fulfill their obligation to inform the public. As this Court has stated, the purpose of section 5 is "to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents." *Field* v. *Clark*, 143 U.S. 649, 670 (1892). This echoes James Wilson's reasoning during the Convention's debate on this section:

> "The people have a right to know what their agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings." J. Madison, Notes on debates in the Federal Convention of 1787, at 434 (Ohio Univ. Press, 1966).

In gauging the tenor of the times, it is significant that this section generated heated battles in the ratification debates, and not because it stood for the principle of Congress' obligation to inform the public. Anti-federalists argued vehemently that the provision did not go far enough, inasmuch as it allowed the people's representatives to con-

duct secret proceedings "in their judgment."[65] They were assuaged only after Madison and other influential members of the Convention assured them that the secrecy provision would be invoked only on extremely rare occasions and that the people's representatives could be trusted to exercise considerable restraint in withholding any proceedings from the electorate.[66]

Given their recognition of the obligation of congressmen to inform and enlighten the electorate; their conviction that communication between a representative and his constituents was the heart of a representative's functions; their knowledge of abuses by the Crown in stifling dissent in the legislature under the guise of punishing "sedition" and "treason"; their decision to require the publication of congressional proceedings; and their fundamental belief in separation of powers, it is manifest that the framers intended the publication of committee hearings by a congressman to be privileged. It is simply inconceivable that they could have intended to allow intrusions by the execu-

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[65] See, for example, Patrick Henry's impassioned plea in the Virginia Ratification Convention:

> "Give us at least a plausible apology why Congress should keep their proceedings in secret. . . . They may carry on the most wicked and pernicious of schemes under the dark veil of secrecy. The liberties of the people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them. The most iniquitous plots may be carried on against their liberty and happiness.
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> ". . . Under the abominable veil of political secrecy and contrivance, your most valuable rights may be sacrificed by a most corrupt faction, without you having the satisfaction of knowing who injured you . . . . We may labor under the magnitude of our miseries without knowing or being able to punish those who produced them." III Elliot's Debates 170, 315-316 (1788). Along the same vein, see III *id.*, at 376-378.

[66] See, *e.g.*, in The Virginia Ratification Debates, III Elliot's Debates at 331-332 (Madison), 399-400 (Madison), 401 (Randolph), 408-409 (Madison), 459 (Mason), 460 (Madison and Mason).

tive or judiciary for any reason into the free communication of information about matters of public importance by a representative to the people. Jefferson's protest against such intrusions is the only position which is consistent with the basic theories of sovereignty, government and representation enunciated in the Constitution: For the Executive and grand jury "to interpose in the legislative department between the constituent and his representatives . . . to put the representative into jeopardy of criminal prosecution, of vexation, expense and punishment . . . if his communications, public or private, do not exactly square with their ideas of fact or right, or their designs of wrong, is to . . . leave us, indeed, the shadow, but to take away the substance of representation . . . rendering ineffectual that wise cautious distribution of powers made by the constitution between the three branches . . . ." [67] They thus understood that restraints on the exercise of the informing function through the publication of committee reports must come from the House itself, which is given ample power in Article I, section 5 to discipline its members.

4. *The Matthew Lyon Case.*

Finally, this view of the framers of our Constitution with respect to the informing function aspect of the privilege was shared by those who counted the most—the people. The privilege of a Congressman to inform his constituents was so well recognized as an essential part of our polity that during the entire disgraceful period of enforcement of the Alien and Sedition Acts, when the Executive equated criticism of its foreign policy with giving aid and comfort to the enemies of the United States, only one prosecution of a congressman for publishing "seditious libels"

[67] Protest, *supra*, pp. 55-58.

occurred. This was the trial of Congressman Matthew Lyon of Vermont in 1798. This trial, its effects on representative government, the intense public reaction to it, and Lyon's ultimate vindication bear witness to the disastrous consequences to separation of powers which result when the executive and judicial branches take action against a legislator who speaks out, in any form, against policies thought by the Executive, but not by the people's representatives in Congress, to be essential to the national security.

Lyon was tried under the Sedition Act for publishing two letters: the first accusing the President of an "unbounded thirst" for power, adulation and ridiculous pomp; and the second reprinting a communication from a French diplomat containing a charge of "stupidity" in our policy towards that country.[68]

Lyon was then "an active opposition member of the House of Representatives, where the vote was so equally balanced as to make his withdrawal of national political consequence; and he was then a candidate for re-election."[69] Lyon offered no real defense, both he and the reporter attributing this to his ignorance of the law (his counsel, the Chief Justice of Vermont, had withdrawn because the Court refused to allow adequate time for preparation).[70] He was found guilty by a jury and sentenced by two federalist judges to four months imprisonment and a fine of $1000. The Administration's careful planning was upset, however, when Lyon's constituents, enraged at the imprisonment of their representative for criticizing Adams,

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[68] *Lyon's Case*, Case No. 8, 646, 15 Fed. Cas. 1183 (C.C.D. Vt. 1798). This case is also discussed in detail in J. M. Smith, Freedom's Fetters, *supra*, at 221-241 in a chapter aptly titled "The Ordeal of the Critical Congressman."

[69] 15 Fed. Cas. at 1187.

[70] *Id.*, at 1185, 1187.

formed a mob and threatened to free him forcibly from jail. Lyon apparently perceived the political leverage he now possessed and quieted the mob. His continued imprisonment was so embarrassing "[t]hat the cabinet panted for an excuse to liberate him."[71] He was offered a pardon for an apology (the President said that "repentance must precede mercy") and, apparently, a money bribe; but Lyon held fast. He was re-elected while in jail by an overwhelming majority, returned to his seat, and continued his attacks on the Administration.[72] A move by Administration forces in the House to expel him failed to get the necessary two-thirds. Lyon served another ten years in the House, and final vindication came in 1840 when an Act of Congress was passed by both Houses and signed by the President declaring his conviction void.[73]

In repudiating the harassment and persecution of Congressman Lyon, Congress believed that it laid to rest forever the premises underlying the Sedition Act. In *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 274-276 (1964), this Court agreed, holding that these premises were inconsistent with the form of government established by the Constitution and "the attack upon [the Act's] validity has carried the day in the court of history." Just as the controversy over the Act "crystallized a national awareness of the central meaning of the First Amendment," *id.*, at 273, the *Cabell* and *Lyon* cases established the centrality of the informing function of Congress and the principles of separation of powers to the free speech privilege of the people's representatives. This broad consensus of opinion, articulated by Jefferson, Madison and Wilson and by the people themselves, ought now to be recognized as the proper mean-

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[71] *Id.*, at 1189.

[72] *Id.*, at 1190.

[73] *Id.*, at 1190-1191.

ing of the Speech or Debate Clause, so that the Sedition Act's "last vestige [is] effaced, and its doctrines finally disowned."[74]

D. English History and Decisions Sustain that Publication of Legislative Proceedings is Guaranteed by the Privilege.

1. *The Purpose of the English Bill of Rights—the Case of Rex v. Williams.*

The Speech or Debate Clause is the product of a lineage of legislative free speech guarantees from the English Bill of Rights of 1689 to the first state constitutions and the Articles of Confederation. *See generally Tenney* v. *Brandhove, supra,* at 372-375. Historians are unanimous in concluding that the *legislative free speech guarantee in the English Bill of Rights resulted from a prosecution of a member of the House for causing to be published and disseminating to the people a committee report and was specifically designed to protect such conduct in the future.*[75] This case, the prosecution of Sir William Williams, Speaker of the House is of overriding importance since it was "one of the immediate causes of the Revolution . . . (and) the occasion of one of the most important clauses in the Bill of Rights, and probably therefore of the like provision in the Constitution of the United States." *McIlwain, supra,* at 242.

The grievance which gave rise to the legislative free speech provision is set forth clearly in the preamble to the Bill of Rights:

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[74] 15 Fed. Cas. at 1191.

[75] See, *e.g.*, McIlwain, *supra,* at 42-44; Wittke, *supra,* at 110-112; W. C. Townsend, History of the House of Commons, 412-416 (1843); Report of House Committee on the Privileges of Parliament (1771), reprinted in 8 S.T. 16-17.

"Whereas the late King James the Second, by the assistance of diverse evill councillors, judges and ministers, imployed by him did endeavor to subvert and exterpate the Protestant religion, and the lawes and liberties of this Kingdome . . . by prosecutions in the Court of King's Bench for matters and causes cagnizable onely in Parlyment . . . The said lords spirituall and temporall and commons . . . for the vindicating and asserting their anntient rights and liberties, declare . . .;"

Corresponding to this article of grievance was the declaration:

"That the Freedom of Speech, and Debates or Proceedings in Parlyment, ought not to be impeached or questioned in any Court or Place out of Parlyment." 1 W. & M., Sess. 2, c. 2

This provision was not by its terms confined to spoken words and could not have been so intended. The last prosecution of members for words spoken in Parliament had occurred in Eliot's case in 1629 during the reign of Charles I, and that conviction was reversed on writ of error by the House of Lords in 1668.[76] The *only* prosecution of a member by King James II was that of Sir William Williams in 1686-1688 for having ordered the publication of a House committee report which alleged misconduct by the king, his family and advisors.[77]

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[76] See pp. 27-29, *supra;* Wittke, *supra,* at 103-106.

[77] See Report of the House Committee on the Privileges of Parliament (1771), reprinted in 8 S.T. 16-17:

"This proceeding the Convention Parliament deemed so great a grievance, and so high an infringement of the rights of Parliament, that it appears to your Committee to be the principal, if not the sole object of the first part of the eighth

The great case of Sir William Williams began during the reign of Charles II, where the House of Commons, of which Williams was Speaker, received a number of narrative reports about an alleged popish plot between the king, his relatives and advisors and the King of France to restore Catholicism as the established religion and to violate the free exercise of religion by Protestants.[78] The most famous of these narratives was Dangerfield's Narrative, which contained allegations of this sort in lurid detail against some of the most prominent members of the court. A committee of the House received this narrative, their report containing it was entered on the Commons Journal, and the House then gave permission to several of its members and outside printers to publish the narrative and other papers relating to the popish plot.[79] Williams, the Speaker, requested and received permission to publish Dangerfield's Narrative.[80] Sir William Courtney, among others, went on record for the reason for the printing:[81]

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head of the means used by King James to subvert the laws and liberties of this Kingdom, as set forth in the Declaration of the Two Houses . . . ."

[78] See generally, J. Pollock, The Popish Plot; A Study in the History of the Reign of Charles II (1944).

[79] See 9 C.J. 630-695. On November 15, 1680, permission was given to Mr. Dugdale; on November 19, to a nonmember, Signior Francisco de Ferra; and on December 23, to Mr. Dennis. See also 9 C.J. 670, for the order permitting other papers about the Popish Plot to be published. The printing continued through 1681 as new information was received. See 9 C.J. 709, 711.

[80] 9 C.J. 649.

[81] II J. Torbuck, A Collection of the Parliamentary Debates in England 96 (1741). (Courtney's statement was made on March 24, 1681.) Another member said, less ominously:

"The Privy Council is constituted by the King, but the House of Commons is by the choice of the people. I think it not natural nor rational, that the people who sent us hither should not be informed of our actions." *Id.*, at 92.

> "Let men know what they please, the weight of England is the people; and the more they know, the heavier will it be; and I could wish some would be so wise as to consider, that this weight hath sunk ill ministers of state, almost in all ages; and I do not in the least doubt, but it will do so to those who are the enemies of our religion and liberties."

A number of seditious libel prosecutions were instituted by Charles II against the authors of virulently anti-Catholic narratives.[82] All were found guilty by the hand-picked judges of the King's Bench.[83] Yet even Charles II dared not attack members of Parliament. This rash action was undertaken in 1686, the year James II succeeded to a turbulent throne, with the filing of an information in the King's Bench against Sir William Williams for the publication of Dangerfield's Narrative.[84]

Williams was represented by Sir Robert Atkyns, a former Chancellor of the Exchequer, who came out of retirement to argue on behalf of the free speech privilege of the House.[85] Atkyns' argument contained a remarkable

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[82] The earlier cases included the Trial of William Staley, 6 S.T. 1501 (1678); Trial of Edward Coleman, 7 S.T. 1 (1678); Trial of Ireland, Pickering and Grove, 7 S.T. 79 (1678); Trial of Green, Berry and Hill, 7 S.T. 159 (1679); Trial of Whitehead, Harcourt, Fenwick, Gowen and Turner, 7 S.T. 311 (1679); Trial of Langhorn, 7 S.T. 418 (1679).

[83] See VI Holdsworth, A History of English Law 502 *et seq.* (1924); J. Pollock, *supra,* at 266-287.

[84] Proceedings Against Sir William Williams, 13 How. St. Tr. 1370 (1686-1688).

[85] Atkyns had been dismissed from the bench for contradicting a dictum of Chief Justice Scroggs that the presentation of a petition for the summoning of Parliament was high treason. For in the life-and-death struggles of the King and his ministers against those who opposed despotism, state trials were not impartial inquiries; the task of the judge was to defend the King's case and

exposition of the origin, development and purposes of the privilege. He traced the history of the privilege from its early judicial antecedents, which he claimed settled the principle that anything said or done in Parliament could not be questioned in any inferior court.[86] He then argued, on functional terms and with an amazingly modern ring, that the privilege encompassed actions of members in effectuating the powers of Parliament. He saw those powers as three-fold: a legislative power, in the enactment of statutes; a judicial power, when acting as the High Court; and a counselling, or enquiring, power.[87] As evidence of the latter he cited the obligation of the House to investigate matters of state, expose corruption and maladministration, punish offending ministers and offer guidance to the king.[88]

Atkyns tied Williams' printing of the report to the enquiring function. He asserted, in fact, that this function

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if he went astray, as did Atkyns, the penalty was dismissal. J. Pollock, *supra,* at 282-287. "It is due to their connection with these trials that posterity has branded the names of three judges (Jeffries, Pemberton and Scroggs) with lasting infamy." *Id.,* at 265. Two of these judges—Jeffries and Pemberton—sat on the court that tried and convicted Sir William Williams. Townsend, *supra,* at 413.

[86] *Id.,* at 1383-1407.

[87] *Id.,* at 1410-1413.

[88] "I might enumerate a vast multitude of Animalia Majora, no small flies, that have in several ages been catched in the net or web of an inquiry made by the House of Commons, who fish only for such greater fish, such as we call the pike, who by oppression live upon the smaller fish, and devour them. The Commons to that end fish with a net, that has a wide and large mesh, such as lets go the small fry, and encompasses none but those of the largest size." *Id.,* at 1413. "The plea shows, that one great lord was convicted . . . by impeachment of the Commons, and attainted before the Lords. The King's speech shows that there was need of further enquiry, and that it was not as yet thoroughly done, nor himself, nor the two Houses safe . . ." *Id.,* at 1414.

was necessary for the accomplishment of all of the House's powers:[89]

> ". . . [T]he enquiry is the most proper business of the House of commons. For this reason they are commonly styled The Grand Inquest of the nation . . . ."
>
> "This enquiry of theirs is necessary in a subserviency of all the several high powers of that high court. Namely, in order to their legislature, or to the exercise of their power of judicature . . . .
>
> "Or it may be in order to their counselling power, for removal of great officers or favorites . . . .
>
> "But still they must first make enquirys . . . [and] the most effectual enquiry is most probably from without doors; and without such enquiry, things of great importance may lie concealed."

Atkyns then responded to the Attorney General's contention that the act of publication divested Williams of the privilege. As a matter of common sense, he said, this was absured. The narrative had already been made public when read before the bars of both Houses and entered in their Journals; the publishing in print changed nothing.[90] Finally, Atkins asked rhetorically, "but what need was there of printing it?" and responded that the House "out of a sense of duty" might decide that it was necessary to inform and alert the public of Dangerfield's charges against high ministers. An enlightened public might then offer more information, "a fuller proof," that could lead to the prosecution, removal, or clearing of the ministers.[91] Publication of the report was a good way of conducting this further enquiry; "of late years enquiry by printing has

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[89] *Id.*, at 1414-1415.

[90] *Id.*, at 1415-1417.

[91] *Id.*, at 1417-1418.

been a most frequent practice, and we meet with it every week, and it is become the most ordinary way of making enquiries, which run into all parts of the nation."[92]

Atkyns' argument was thus a forerunner of the standard applied two hundred years later by this Court—that the privilege protects things "generally done" by members "in relation to the business" before the legislature.[93] In ordinary times, this argument would have been successful; but James II dismissed the honest judges of the King's Bench and caused Williams to be tried by a court headed by the notorious Jeffries.[94] The plea of privilege was rejected out of hand and Williams was fined ten thousand pounds.[95]

James II was sent into exile shortly after Williams' conviction, and a committee was appointed by the House of Commons "to bring in general Heads of such things as are absolutely necessary to be considered for the better securing our Religion, Laws, and Liberties." The committee was chaired by Sir George Treby and contained Sir Wil-

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[92] *Id.*, at 1418.

[93] *Kilbourn* v. *Thompson, supra,* at 204.

[94] Townsend, *supra,* at 413. Jeffries earned the nickname "The hanging judge" when he was dispatched by James II to try participants in the unsuccessful Scot revolt; James II is said to have commented that there was no doubt as to the outcome: "Jeffries will try them and they shall surely hang." See also fn. 85, *supra.*

[95] See *Rex* v. *Williams,* 2 Show. K. B. 471, Com. 18, 89 Eng. Rep. 1048:

> "[Williams' counsel] began, 'The Court of Parliament . . .'
> "Lord Chief Justice [interrupting]: 'Court, do you call it? Can the order of the House of Commons justify the scandalous, infamous flagitous libel? . . . Let judgment enter for the King.'"

Williams paid 8,000 pounds, and the King acknowledged satisfaction. No better case of "intimidation by the executive and accountability before a possibly hostile judiciary," *United States* v. *Johnson, supra,* at 181, is found in the reports.

liam Williams.[96] The committee reported back, and Treby said of the free speech guarantee:[97]

> "This Article was put in for the sake of one, once in your place (i.e., the Speaker), Sir William Williams, who was punished out of Parliament for what he had done in Parliament."

A delegation was then sent to the House of Lords, with Williams at its head, and in February of 1689 the two Houses agreed upon the broad language of the Bill of Rights.[98] In July, the House of Commons passed a specific resolution that the judgment of the King's Bench against Williams "is an illegal Judgment, and against the Freedoms of Parliament."[99]

This history should lay to rest any contention that the publication and dissemination of legislative proceedings is

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[96] 10 C.J. 15 (January 29, 1689).

[97] 9 Grey's Debates 81, reprinted in Report from the Select Committee on the Official Secrets Act 24 (House of Commons, 1939).

[98] 10 C.J. 21 *et seq.*

[99] 10 C.J. 215. A bill to reverse the conviction and compensate Williams for the fine was sent to the House of Lords. The Lords did not act favorably upon it because that would have required payment to Williams of the not insubstantial amount of 8000 pounds from a greatly depleted treasury. There was "no disposition to make pecuniary compensation to any of those who had suffered illegally during James' reign, unless a source independent of the public purse could be found for that purpose." Townsend, *supra*, at 415. See also 13 How. St. Tr. at 1438-1439. Consideration was given to confiscating the estates of Jeffries and Sir Robert Sawyer, who had filed the information against Williams, but the Lords declined to do so in 1695. On that occasion, Williams spoke eloquently:

> "I value much more your rights and my own honor, than I do my estate . . . . It is my glory that I have left a record for the rights and freedom of Parliament. In this proceeding posterity will justify me." 13 How. St. Tr. at 1440.

not protected legislative activity. On the contrary, it is fair to conclude that the free speech guarantees beginning with the English Bill of Rights were designed to protect just such activity.

2. *Subsequent-Decisions Holding the Privilege Applicable to Members who Publish Without Permission of the House.*

The English Bill of Rights of 1689 overruled the King's Bench decision in the *Williams* case and established that publication of proceedings was encompassed within the free speech privilege. Williams had, however, obtained an order from the House to publish Dangerfield's Narrative. It would seem to be a short step from that to the protection of publication by a member on his own.[100] Yet that step was taken only after a prolonged conflict with the courts between 1795 and 1868. Care must be taken in analogizing the English cases—all decided after the Constitution was written—to the scope of the privilege in America because of the existence of certain historic factors in England which were there relevant in molding the privilege in this area but which have never existed in our country. The major factor is the standing rule of the House of Commons, dating back to the early 1600's, which prohibited the publication of its proceedings, either by members or by the press, except by specific leave of the House.[101] This rule was justified first to insure secrecy against Stuart and Tudor monarchs who systematically threatened retaliation against members who were discovered to have intruded into their prerogatives in parliamentary debates, but the rule was later invoked out of fear of misrepresentation in

[100] After all, the order of only one House does not constitute law.

[101] See II T. E. May, Constitutional History of England 34 (10th ed. 1891).

the press and a general intolerance to public opinion.[102] When individual members and the House printers then claimed the right to publish the proceedings, their arguments about the necessity to enlighten the public were greeted quite unsympathetically by courts which had observed the imprisonment of newspapermen by the House for the violation of the standing rule.[103] These circumstances, of course, did not exist in America, where Congress was *required* by the Constitution to publish its proceedings and where Congress from its earliest days recognized its obligation to make its proceedings widely available to the public and encouraged individual members to do so.[104]

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[102] See T. E. May, Parliamentary Practice 53 (15th ed. 1950); Parry, Legislatures and Secrecy, 67 Harv. L. Rev. 737, 742 (1954).

[103] See II T. E. May, Constitutional History of England 33-49 (10th ed. 1891).

[104] This argument was made by several constitutional law experts in Congress during the debates in Sam Houston's case in 1832. A Congressional opponent of Houston had attacked him in a speech on the floor and then had the speech reprinted in a Texas newspaper. Houston later assaulted violently this congressman on a Washington street, for which he was tried for contempt of Congress. One of Houston's defenses was that he had not committed a breach of the free speech privilege because the assault was motivated by the publication and not the speech. Although this defense was rejected on the facts, it did set off a marathon debate on the scope of the speech and debate privilege. The virtually unanimous view of the House was that publication of speeches and reports was encompassed within the privilege. Representatives stressed the functional nature of the Speech or Debate Clause as protecting all the necessary and customary duties of office. They viewed the informing function as just such a duty implicit in our system of representative government. And they distinguished English cases as resting on the standing rule of the House of Commons which prohibited publication. See especially Gales & Seaton's Register 2840-2852 (May 8, 1832) (Mr. Ellsworth); 2871-2884 (May 9, 1832) (Mr. Doddridge); 2930-2968 (May 10, 1832) (Mr. Crane) 2970-2971 (May 10, 1832) (Mr. Burges); 2983-2984 (May 11, 1832) (Mr. Archer); 2989-3002 (May 11, 1832) (Mr. Kerr).

An examination of these post-Constitution English cases is nevertheless instructive because the privilege was ultimately extended to publication of legislative proceedings due to the recognition of the informing function of Parliament. In England, members of Parliament are now privileged in publishing speeches and reports for the information of their constituents, and this privilege applies derivatively to publishers and to the press. The first cases which held to the contrary, and which were relied upon by the Court of Appeals,[105] were never firmly settled and have not survived. The evolution of English decisions is as follows:

(a) In *Rex* v. *Lord Abington*, 1 Esp. 226, 170 Eng. Rep. 337 (1795), a member of the House of Lords accused his attorney of unprofessional conduct, in a speech on the floor. Abington later arranged for the speech to be published, and the attorney instituted a libel action. Although Abington pled the privilege as a bar to the action, he did not argue that the privilege was applicable due to his obligation to inform his constituents; nor could he have so argued since he was a member of the House of Lords, and thus not elected to Parliament. Lord Kenyon sitting *nisi prius*, rejected the plea. His opinion is quite clear in upholding the right to publish speeches made in Parliament, but he excluded from that right libels against *private individuals*:

> "A Member of Parliament has certainly the right to publish his speech, but that speech should not be made a vehicle of slander against any *individual;* if it was, it was a libel." *Id.*, 170 Eng. Rep. at 340. (Emphasis added.)

(b) Four years later, in *Rex* v. *Wright*, 8 T.R. 293, 101 Eng. Rep. 1396 (1799), the King's Bench held a bookseller

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[105] P.W.C. 9a.

absolutely immune for printing and circulating an allegedly libellous House report. The Crown relied principally upon the trial of Sir William Williams as *authority* for this prosecution; but Lord Kenyon, now Chief Justice, dismissed the argument with the comment that that case "happened in the worst of times." Justice Grose, more forthrightly, said of the *Williams* case, "it must be remembered that that was declared by a great authority to be a disgrace to the country." And Lord Kenyon stated the broad principle:

> "[T]he report in question, being adopted by the House at large, is a proceeding of those who, by the constitution, are the guardians of the liberties of the subject; and we cannot say that any part of that proceeding is a libe." *Id.*, 101 Eng. Rep. at 1398.

The third member of the Court, Justice Lawrence, concurred on the basis of the public's right to be informed fully about proceedings in Parliament:

> ". . . It is of advantage to the public, and even to legislative bodies, that true accounts of their proceedings should be generally circulated; and they would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller." *Id.*, 101 Eng. Rep. at 1399.

(c) Obviously, there was a basic inconsistency in the approach taken by the court, including Lord Kenyon, in *Wright* as contrasted to *Abington*. Unfortunately, by the time that *Rex* v. *Creevey*, 1 M. & S. 272, 105 Eng. Rep. 102 (1813), a libel action for publication against a member of the House, was decided, Lord Kenyon had died and his successors had to reconcile the precedents. Instead, they

held that the privilege did not extend at all to a publication of a speech—a position hardly supported even by the narrow holding of *Abington*—the theory being that since the House has a standing order against publication of its proceedings, any member who does so is acting *ultra vires*. See *Wason* v. *Walter*, discussed in (e), *infra*.

(d) In *Davison* v. *Duncan*, 7 E. & B. 229, 233, 119 Eng. Rep. 1233, 1234 (1857), all of the justices agreed in dictum, that despite *Creevey* a member of Parliament was privileged in republishing a speech in order to disseminate it to his constituents.

(e) In *Wason* v. *Walter*, L.R. 4 Q.B. 73 (1868), the Court held, in a libel action against a bookseller for publication of a speech in Parliament that the privilege protected a member, if published "for the information of his constituents," *id.*, at 95, and afforded derivative protection to a publisher.

The governing principle was that the informing function of Parliament was essential to representative government:

> ". . . How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the legislature, and the country at large? . . . It seems to us impossible to doubt that it is of paramount public and national im-

portance that the proceedings of the houses of parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends." *Id.*, at 89.

The court then severely criticized the reasoning of earlier cases, including *Stockdale* v. *Hansard*, 9 A. & E. 2, 112 Eng. Rep. 1112, (1839), and *Abington* and *Creevey* were limited in the narrowest possible manner. Finally, the Court forthrightly rejected the *ultra-vires* argument:

"It only remains to advert to an argument urged against the legality of the publication of parliamentary proceedings, namely, that such publication is illegal as being in contravention of the standing orders of both houses of parliament . . . . [P]ractically, each house not only permits, but also sanctions and encourages, the publication of its proceedings, and actually gives every facility to those who report them . . . . Collectively, as well as individually, the members of both houses would deplore as a national misfortune the withholding their debates from the country at large . . . . The standing orders which prohibit it are obviously maintained only to give to each house the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded. Independently of the orders of the houses, there is nothing unlawful in publishing reports of parliamentary proceedings. Practically, such publication is sanctioned by parliament; *it is essential to the working of our parliamentary system, and to the welfare of the nation.* Any argument founded on its alleged illegality appears to us, therefore, entirely to fail." L.R. 4 Q.B. at 95. (Emphasis added.)

(f) *Wason* v. *Walter, supra,* was the last judicial decision in England considering the privilege in the context of publishing proceedings. In 1938, however, the House of Commons appointed a select committee to consider the applicability of the Official Secrets Act to members of Parliament. The incident precipitating the appointment of the committee was the action of a military court of inquiry in subpoenaing a member of the House of Commons, Duncan Sandys, who obtained and disclosed highly sensitive military documents, containing current battle of order plans and marked "secret," allegedly in violation of the Official Secrets Act. The committee asked Sir Gilbert Campion, a noted scholar and legal advisor to the House, to prepare a memorandum on the law of privilege in England. He concluded, among other things, that a member was immune from judicial proceedings and all forms of executive and judicial harassment for receiving documents in violation of the Act and in disclosing them on the floor or in committee. Report from the Select Committee on the Official Secrets Act 23-28 (1939). He then reviewed the libel cases from *Abington* through *Wason* v. *Walter* and concluded that the privilege would include as well the publication and dissemination to the public of such a speech or hearing, at which he disclosed classified information:

> "If . . . a member circulated among his constituents a speech made by him in Parliament in which he had disclosed information of the kind in question, it might be held on the analogy of the principles which have been said to apply to prosecutions for libel that he could not be proceeded against for disclosing it to his constituents, unless, of course, the speech had been made in secret session. Even if the suggested analogy is not admitted, it would be repugnant to common sense to hold that though the original disclosure in the House

was protected by parliamentary privilege, the circulation of speech among the member's constituents was not." *Id.*, at 29.

In America, Congress has never had standing orders against publication; from the beginning, Congress has actually encouraged it. See, *e.g.*, 39 U.S.C. § 4163 (the franking privilege). Indeed, such a rule would appear to be specifically prohibited by Article I, section 5. And the legislative privilege for publication was recognized fully in England only after democratic reforms had emphasized the primacy of Parliament as the people's representatives, and the correlative informing duty. Again, in America, this was the revolutionary presupposition of our Constitution.

Over one hundred years ago, the British recognized that parliamentary privilege, for both members and those acting on their behalf, must extend to the publication of parliamentary papers in order to ensure the public that legislators will perform their vital informing function. There is no reason in history or policy why the rights of the people's elected representatives should be narrower in the United States. In fact, it would be anomalous in the extreme for Great Britain, a country in which separation of powers is *not* a constitutional principle of government, to have definitively established this privilege, but for the United States, where separation of powers has been a basic doctrine from the outset, to reject it.

E. The Privilege is not Divested Because the Legislative Activity in Question was Carried Out in a Manner Deemed by a Federal Court to be Irregular and Contrary to the Court's Notion of Germaneness.

Perhaps out of recognition that its holding was at odds with the thrust of prior decisions of this Court and

was inconsistent as well with the history and policies underlying the Speech or Debate Clause, the Court of Appeals suggested that ordinary publication of committee reports might well be constitutionally protected but that this particular instance was not. This was implied in the initial decision[106] and stated beyond doubt in the second opinion (on rehearing), where the Court of Appeals "dr[ew] a distinction between normal and customary republication of a speech in Congress and republishing privately all or part of 47 volumes of, we must presently assume, lawfully classified documents, through the device of filing them as exhibits to the records of a subcommittee to which they have no conceivable concern." (P.W.C. 2c.)

The clarifying language in the opinion on rehearing indicates clearly that the Court of Appeals has thus taken upon itself the power of determining whether or not a procedure followed by a senator in the performance of his legislative functions is sufficiently "regular" so as not to divest his protection under the Speech or Debate Clause. In so doing the Court of Appeals has departed drastically from settled principles. Even the District Court recognized in its opinion that "[t]he courts have no right to dictate . . . the procedures for Congress to follow in performing its functions. . . ." and that "[j]udging the applicability of the legislative privilege in the exercise of the functions of a legislator's office should be done 'without inquiring whether the exercise was regular according to the rules of the House, or irregular and against their rules,' " 332 F. Supp. at 936. See also, *e.g.*, *Tenney* v. *Brandhove*, *supra*; *Coffin* v. *Coffin*, *supra*; and *Cochran* v. *Couzens*, 42 F. 2d 783 (D.C. Cir. 1930).

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[106] "We will not hold that there is a constitutional privilege to print privately what, we must assume for present purposes, were classified documents simply because intervenor (Senator Gravel) had first disclosed them to a Senate subcommittee whose function was totally unrelated thereto." (P.W.C. 10a.)

Article I, section 5 of the Constitution vests in Congress, and Congress alone, the power to make and enforce rules for its proceedings. This is a "textually demonstrable commitment" of authority to a coordinate branch of government, cf. *Baker* v. *Carr*, 369 U.S. 186 (1961), and clearly precludes superintendence by the judicial branch. How a House of Congress internally allocates its functions among its committees is a political question which is beyond the cognizance of the courts.[107] The judiciary has no more authority to tell a senator what is "germane" to the subcommittee which he chairs[108] than to adjudicate the current jurisdictional dispute between the Foreign Affairs and Armed Services Committees. The privilege is inapplicable to committee investigations only when it is "obvious that there was a usurpation of functions exclusively vested in the Judiciary or in the Executive." *Tenney* v. *Brandhove*, *supra*, at 378. As the District Court observed, a committee investigation into the causes and conduct of the war in

[107] Of course, as with other variants of the political question doctrine, when a committee infringes upon an individual's constitutional rights, the courts may be obliged to examine enabling legislation in order to determine whether there is an overriding governmental interest. *E.G.*, *Watkins* v. *United States*, 354 U.S. 178, 205 (1957). Here, no such claim is made by the Government, and the matter is "peculiarly within the realm of the legislature." *Ibid.* See also *Yellin* v. *United States*, 374 U.S. 109, 121-122 (1963), which drew this distinction precisely.

[108] Moreover, even if somehow the Court of Appeals possessed the constitutional power to substitute its judgment for Senator Gravel's or what is relevant to the subcommittee, its conclusion that the documents in question are not, is a mere *ipse dixit*. The Court of Appeals did not even examine the enabling rules of the subcommittee; nor did it investigate past practices; nor did it consider the impact of the fact that there is no germaneness rule in the Senate; nor did it answer Senator Gravel's point that the war in Vietnam was relevant to the business of many subcommittees, including his own, because of its effects on the availability of funds for domestic programs.

Vietnam is hardly such a "usurpation," 332 F. Supp. at 935.[109]

It is equally clear that there is nothing in the nature of "private" publication which may defeat the privilege. Technological developments in printing have so persuaded congressmen and other public officials to utilize private facilities to disseminate reports and records in order to obtain the cheapest and most widespread distribution that it is now a dominate mode of publication. This Court may take judicial notice of the fact that, for example, every important commission report over the last decade has been printed privately.[110] Similarly, transcripts of many signif-

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[109] The Court in *Kilbourn* v. *Thompson, supra,* at 205, cited the kind of "usurpation" of authority which would fall outside of the privilege:

> "If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act so as to imitate the Long Parliament in the execution of the Chief Magistrate of the Nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment, we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate."

[110] See Violence in America, Historical & Comparative Perspectives (Graham and Gurr et als., Task Force on Historical & Comparative Perspectives, Report to the National Commission on the Causes and Prevention of Violence) (1969); To Establish Justice, To Insure Domestic Tranquility (National Commission on the Causes and Prevention of Violence, introd. by Reston) (1970) ("Eisenhower Commission Report") (1969); The Challenge of Crime in a Free Society (President's Commission on Law Enforcement and Administration of Justice, introd. by Silver) (1968); Rights in Conflict: The Violent Confrontation of Demonstrators and Police in the Parks & Streets of Chicago During the Week of the Democratic Convention of 1968 (Report to the National Commission on the Causes and Prevention of Violence, introd. by Max Frankel) (1968) ("The Walker Report") (1968); Report by the U.S. National Advisory Commission on Civil Disorders (1968) ("The Kerner Commission Report"); Report of the Commission on Obscenity and Pornography (1970).

icant congressional committee hearings have been printed privately and published in book form. Some of the better known examples are the 1966 Senate Committee Hearings on the Vietnam War,[111] the 1954-1955 Subcommittee Hearings on Juvenile Delinquency,[112] the 1961 Subcommittee Hearings on Employment, Manpower and Poverty,[113] the Hearings on the Housing Act of 1936,[114] the 1937 Hearings on the Reorganization of the Federal Judiciary,[115] the 1902 Hearings on the Philippine Insurrection,[116] the 1867 House Hearings on the New Orleans race riots,[117] the 1866 Hearings on the Memphis riots,[118] and the 1866-1868 Report of the Joint Committee on Reconstruction.[119] And even before

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[111] The Vietnam Hearings (copyright and intro. by J. W. Fulbright) (1966); The Truth About Vietnam: Report on the U. S. Senate Hearings (analysis by Wayne Morse, intro. by J. W. Fulbright) (1966); U. S. Policy Toward China: Testimony Taken from the Senate Foreign Relations Hearings (1966).

[112] Juvenile Delinquency (Youth Employment) (1968); Juvenile Delinquency: National, Federal and Youth Serving Agencies (1968); Juvenile Delinquency: Comic Books, Motion Pictures, Obscene and Pornographic Materials, Television Programs (1969); Juvenile Delinquency: Treatment and Rehabilitation of Juvenile Drug Addicts (1969).

[113] The Manpower Revolution: Its Policy Consequences (1965).

[114] Summary of Hearings on the Wagner Housing Bill (National Association of Housing Officials 1936).

[115] Reorganization of the Federal Judiciary (1970).

[116] American Imperialism and the Philippine Insurrection (1969).

[117] New Orleans Riots of July 30, 1866 (1969).

[118] Memphis Riots and Massacres, 1866 (1969); Memphis Riots and Massacres (1969); Background for Radical Reconstruction (1970).

[119] Report of the Joint Committee on Reconstruction (1971).

Other privately published congressional committee reports, listing of which is found in, among others, the Library of Congress card catalogue, include: The Jewish National Home in Palestine (House Committee on Foreign Affairs) (Hearings, 1970); The

this development became so pronounced, the public print-

Computer and Invasion of Privacy (House Committee on Government Operations Subcommittee) (Hearings, 1967); China, Vietnam and the United States (Senate Committee on Foreign Relations) (Hearings, 1966); The Ku-Klux Klan (House Committee on Rules) (Hearings, 1969) (reprint of the first publication of 1921); Invasion at Harper's Ferry (Senate Select Committee on the Harper's Ferry Invasion) (1969); Abridgement of the Debates of Congress, from 1789 to 1865 (1857-1861) (work then in progress); Affairs in the Late Insurrectionary States (Joint Select Committee on the Condition of Affairs in the Late Insurrectionary States) (1969); American Foreign Policy: Basic Documents, 1941-1949 (Prepared at the request of the Senate Committee on Foreign Relations by the staff of the Committee and the Department of State) (1971); Report of the Joint Committee on the Investigation of the Pearl Harbor Attack (Joint Committee on the Investigation of the Pearl Harbor Attack) (1972); The Journal of the Joint Committee of Fifteen on Reconstruction (B. B. Kendrick) (1969); Urban Crisis in America: The Remarkable Ribicoff Hearings (C. O. Jones and L. D. Hoppe, eds.); Reports on Crime Investigations (Senate Special Committee to Investigate Organized Crime in Interstate Commerce) (1969); Third Interim Report (Senate Special Committee to Investigate Organized Crime in Interstate Commerce) (1951); American Indians: Facts and Future, Toward an Economic Development for Native American Communities (Joint Economic Committee) (1970); National Priorities: Military, Economic, and Social (Joint Economic Committee, Subcommittee on Economy in Government) (1969); Soviet Economic Growth: A Comparison with the United States—A Study Prepared for the Subcommittee on Foreign Economic Policy of the Joint Economic Committee (Library of Congress, Legislative Reference Service) (1968); An Economic Profile of Mainland China (Select papers contributed by invited specialists for the study which was undertaken by the Joint Economic Committee) (forward by William Proxmire) (1968); Comparisons of the United States and Soviet Economies (Joint Economic Committee) (1968); Investigations of Senators Joseph R. McCarthy and William Benton, Report of the Subcommittee on Privileges and Elections to the Committee on Rules and Administration (Senate Committee on Rules and Administration) (1953); Enough Rope: The Inside Story of the Censure of Senator Joe McCarthy by his Colleagues—the Controversial Hearings that Signaled the End of a Turbulent Career and a Fearsome Era in American Public

er, who is after all distinguished only by being subsidized by the taxpayer, has not had a status at all different, under either American or English Law, from private printers who publish legislative proceedings.[120]

Life (Senate Select Committee to Study Censure Charges) (1969); A Second Federalist—Congress Creates a Government (Selected from the Annals of Congress by Charles S. Hyneman and George W. Carey) (1967); Communism, Its Plans and Tactics (House Committee on Foreign Affairs) (by Frances P. Bolton, chairman, and other Members of Congress) (1949); Hearings on the Permanent Court of International Justice Before a Subcommittee of the Committee on Foreign Relations (Committee on Foreign Relations) (1924); Investigation of Administration of Louis F. Post, Assistant Secretary of Labor, in the Matter of Deportation of Aliens (House Committee on Rules) (1971); How Bull Run Battle Was Lost—The Ball's Bluff Massacre (Joint Committee on the Conduct of the War) (1863); The Secretary of State and the Ambassador—Jackson Subcommittee Papers on the Conduct of American Foreign Policy (Senate Committee on Government Operations) (1964); Rebel Barbarities—Official Accounts of the Cruelties Inflicted Upon Union Prisoners and Refugees at Fort Pillow, Libby Prison, Etc. (Joint Committee on the Conduct of the War) (1864); Army of the Potomac—History of Its Campaigns, the Peninsula, Maryland, Fredericksburg (Testimony of three commanders; Joint Committee on the Conduct of the War) (1863).

[120] See *Hentoff* v. *Ichord*, 318 F. Supp. 1175, 1180 (D. D.C. 1970) 1 The Parliamentary Papers Act, §§ I and II (3 & 4 Vict., c. 9 (1840); *Wason* v. *Walter*, 4 Q.B. 73 (1868). It should be noted that in this case Beacon Press made its paperback edition available to the public in sufficient quantity at a price of $20 for the set, while the Government Printing Office made available a limited printing of a censored edition, with unnumbered pages (making the work less useful as a research and reference tool) at a price of $50. Similarly, private publications of other important commission reports and congressional hearings have sold much more than the editions published by the Government Printing Office. For example, we have been advised by the Library of Congress that the Bantam edition of the Kerner Commission report had sales of 1,895,000, as compared to 62,500 for the G.P.O. edition (the latter costing almost three times the former); the Bantam edition of the Lockhart Commission Report was 250,000 and the

As this Court has recognized, the privilege would be "of little value" if it turned upon such amorphous concepts as "germaneness" and "regularity," for such standards in reality reduce to the way in which a judge or jury, in its discretion, speculates about the propriety of a congressman's actions. *Tenney* v. *Brandhove, supra,* at 377. The doctrine announced by the Court of Appeals, for the first time in our jurisprudence, would permit private suits against congressmen for speaking to their colleagues and to the electorate—which should be dismissed summarily—to go to the trier of fact upon a simple allegation of irrelevance or irregularity. *But see, e.g., Cochran* v. *Gouzens, supra.* It would permit the institution of grand jury proceedings and criminal prosecutions against disfavored legislators upon the same naked assertion. The "absolute" protection[121] of the Speech or Debate Clause would crumble, and the "practical security" it seeks to afford rendered illusory, in the face of essentially political questions of regularity and propriety. This is precisely such a case. The executive branch believed that it would be improper to reveal to the public the contents of the Pentagon Papers; a United States senator, elected by the people, believed that it would be improper for those documents to be withheld from public scrutiny and that he had the duty to inform the people of their contents. The executive branch now

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G.P.O. only 10,000 (with a similar price differential); and the combined sales of private editions of the 1966 Vietnam hearings totalled 42,000, compared to 6,023 for the G.P.O. edition.

[121] The Speech or Debate Clause affords "an absolute privilege to members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in session." *Barr* v. *Matteo, supra,* at 569. See also, *e.g., Powell* v. *McCormack, supra,* at 503; *Dombrowski* v. *Eastland, supra,* at 84-85; *Barsky* v. *United States,* 167 F. 2d 241, 250 (D.C. Cir.), cert. denied 334 U.S. 843 (1948); *Cochran* v. *Couzens,* 42 F. 2d 783 (D.C. Cir.), cert. denied 282 U.S. 874 (1930).

asks the courts to umpire this dispute. "Courts are not the place for such controversies." *Tenney* v. *Brandhove*, *supra*, at 378. Neither are grand juries.

PART II.

The Speech or Debate Clause Prohibits Grand Jury Investigation into the Legislative Acts of a Senator through the Interrogation of Persons who Assisted Him in the Performance of his Duties.

In the preceding part, we have shown that the historical underpinnings of the Speech or Debate Clause, the purposes for its inclusion in the Constitution, and the specific intentions of the framers, all lead to the inescapable conclusion that the publication and circulation of the subcommittee record are privileged from judicial inquiry because they fall within the category of actions necessary to foster the aims of representative government and are customarily done by congressmen in relation to the business before the legislature. The protection given to acts such as these does not derive as an emolument of office but is essential to preserve the independence, integrity and freedom of the legislative branch and, hence, the rights of the people.

The executive branch in this case claims the right to intrude deeply into the legislative process by investigating, through the compulsory process and contempt powers of the grand jury and of the courts, the privileged legislative activities of Senator Gravel. It claims the right to subpoena everyone with whom the Senator dealt in the performance of his constitutional obligations and to interrogate them about how and why the Senator prepared for and conducted the subcommittee hearing and how and why he arranged for the publication and dissemination of the record of that hearing to his colleagues and to the electorate. The executive branch thus asks this Court to hold

that it may, in conjunction with the grand jury, intensively breach the sanctity of the legislative process. And, although given ample opportunity to do so in the lower courts, the Government has not even offered a reason, beyond the broadest of generalities, why this intrusion into the privileged activities of a coordinate branch would be even helpful, let alone necessary, in the enforcement of the criminal laws.

In evaluating whether this proposed investigation is barred by the protections of the Speech or Debate Clause, consideration must, of course, be given to the role which the Clause plays in our system of separation of powers and to its basic purpose of giving "practical security" to the legislature. *United States* v. *Johnson, supra*. Likewise, consideration must be given to the legitimate social interest in the enforcement of criminal and civil laws, save in those situations where constitutional mandate and overwhelming social policy dictate otherwise. *Ibid.*

A. An Investigation by the Executive Branch, in Conjunction with the Grand Jury, into the Legislative Acts of a Senator Violates the Doctrine of Separation of Powers.

As has been pointed out, *supra*, at pp. 5-10, the Justice Department in this case started out its intended investigation of the publication of the subcommittee record by focusing upon Senator Gravel personally. The lack of success of this focus in the courts below has forced the Justice Department to abandon any attempt to subpoena Senator Gravel in order to inquire into the details of his privileged conduct.[122]

[122] The Solicitor General stated in the petition for certiorari that there has never been any intention to call Senator Gravel as a witness before the grand jury (S.G.P. 15). The record makes clear

However, the Justice Department persists in continuing its investigation of the Senator's conduct in holding the hearing and publishing the record by seeking to interrogate parties whose aid was a *sine qua non* to the Senator's accomplishment of his legislative task, namely the Senator's aide and those who assisted him in publishing the record.

The argument made by the Senator herein is not that the introduction of the Pentagon Papers into the subcommittee's official record "bathes" all actors in the transaction with senatorial immunity in order to protect them or anyone. Rather, the Senator argues that on the facts of this case, in order for *the Senator* to be protected against unseemly and unconstitutional executive and judicial "question[ing] in any other Place" concerning his legislative acts, he must be able to assert his privilege against having those who assisted him in the accomplishment of his legislative obligations questioned about those very subjects on which the Government has now abandoned any efforts to question the Senator personally.[123] It is the Senator's own privilege, and more importantly the rights of the sovereign

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that this simply is not so. Not only did the Justice Department claim the legal right to do so in both the District Court and the Court of Appeals, it also implied strongly that Senator Gravel would in fact be subpoenaed and could invoke his Fifth Amendment privilege "should questions be incriminating" (App. 8). The Justice Department retreated from this position only after the District Court issued its Protective Order.

[123] There is no force in the argument that the Speech or Debate Clause literally prohibits only questioning of Senators and Representatives. First of all, as we have emphasized, with perhaps tiresome reiteration, the Clause is to be read broadly to effectuate its purposes. Secondly, the present form of the Clause is clearly stylistic. The Committee on Detail in the convention wrote the Clause in subject-matter terms, following the English Bill of Rights:

> "Freedom of speech and debate in the Legislature shall not be impeached or questioned in any Court or place out of the Legislature." III Documentary History of the Constitution of the United States 447 (1900).

people, that he seeks to vindicate, not any right or privilege that inheres independently in such aides and other parties.

It must be understood at the outset that the Senator's argument here is very limited. He does not argue that either he or his aides or other parties are bathed with any immunity from questioning where what they did, saw or heard was not a necessary and proper adjunct to a legislative act. Nor does the Senator here venture a view with respect to whether or not any party with whom he did or did not deal is bathed with any kind of immunity from prosecution or accountability.[124]

In fact, we will assume that if the Senator personally had "stolen" the Pentagon Papers, and if such an act were a crime, then he could be prosecuted for that criminal act. Certainly, then, aides and other assistants could likewise be prosecuted.

But there has been no suggestion in this case that the

This provision was changed to the present form by the Committee on Style and the change was not mentioned as substantive. This Court has twice confirmed that the Clause is "substantially identical" to the English Bill of Rights. *Powell* v. *McCormack*, *supra*, at 502, n. 20; *United States* v. *Johnson*, *supra*, at 177-178.

[124] As counsel for Senator Gravel remarked in the District Court at the opening of this litigation:

> "If we should, for instance, move to intervene and then it is determined that the issue before the grand jury for which Dr. Rodberg has been subpoenaed has nothing to do with the Senator, then we have no interest or right to be there. If, on the other hand, the questions for which the grand jury has subpoenaed Dr. Rodberg do relate to the Senator's activities, then we want to be very vigorous in our representation." (App. 42.)

Counsel for the Senator in the District Court further disclaimed any belief by the Senator that he could invoke his privilege to protect Dr. Rodberg from questioning with respect to activities, even activities relating to the Pentagon Papers, which predated the establishment of his aide relationship with the Senator. (App. 41.)

Senator or anyone working under his direction "stole" the Pentagon Papers. The investigation for which Dr. Rodberg, Howard Webber, and Beacon Press officials and others have been subpoenaed focuses directly and entirely on the preparation for the subcommittee meeting and the subsequent publication of the record thereof, and the finder of fact so stated. (S.G.P. 39.) To put the matter more precisely in the language of prior opinions of this Court, the Justice Department focuses its inquiry on acts "generally done" in a session of the legislature by a member in relation to the business before it.

1. *The Inquiry Proposed by the Justice Department.*

The Justice Department now acknowledges that the Speech or Debate Clause bars direct questioning of a member of Congress about his legislative acts. (S.G.P. 10.) Yet it seems evident that exactly the same constitutional evil may result from a grand jury inquiry into the congressman's legislative acts through the interrogation of everyone with whom he dealt. In the course of his legislative activities, a congressman must of necessity deal with many people, and the interrogation of them before the grand jury will accomplish by indirection precisely what the Justice Department concedes cannot be done directly—the intensive breach of the sanctity of the legislative process. The Executive, with the assistance of the grand jury, may, under the claim now advanced by the Solicitor General, investigate how a congressman wrote a speech, what materials were in his possession, what conversations he had prior to speaking out or voting on controversial issues, how he prepared for and held a hearing, how he made his speeches, reports and hearings available to the electorate, and why he engaged in any of these legislative activities. This case represents just such a situation. It is difficult to imagine a Senator adequately

preparing for and holding a committee hearing without the assistance of aides, or of performing the informing function adequately without the assistance of printers. The interrogation of Dr. Rodberg before the grand jury about the hearing, and of Webber and the Beacon officials about the publication of the record, would disclose *precisely* the same amout of information about the Senator's privileged activities as if he himself were called.

This kind of unrestrained intrusion [125] into privileged legislative activity is a clear and blatant violation of separation of powers. The Speech or Debate Clause was designed to serve the function of "reinforcing the separation of powers so deliberately established by the Founders." *United States* v. *Johnson, supra,* at 178; Federalist No. 48 (Madison). See also I Works of James Wilson 299 *et. seq.* (McCloskey ed. 1967). Indirect and subtle breaches of separation of powers are just as prohibited as direct and massive violations, for, as the framers well understood, "power is of an encroaching nature, and . . . it ought to be effectually restrained from passing the limits assigned to it." Federalist No. 48 (Madison).[126] Stripped of its verbiage, the issue here is a simple one: May the executive branch and the grand jury investigate the privileged legislative activities of a member of Congress? Unless the stone wall conception of the doctrine of separation of powers is reduced to a pleasant-sounding, but meaningless, metaphor, the answer must be emphatically "No."

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[125] It is significant, in this regard, that the usual rules of evidence relating to relevancy, hearsay, etc., do not apply in the grand jury.

[126] "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

2. *The Inquiry Permitted by the Court of Appeals.*

The same basic principle of separation of powers forecloses the very substantial inquiry permitted by the Court of Appeals, which would allow the interrogation of all those except his personal aides who assisted the Senator in the performance of his legislative activities, so long as the "object is [not] to attack the legislator's motives in speaking." (P.W.C. 12a.) In so holding, the Court of Appeals misapprehended the holding of *United States* v. *Johnson*, *supra*, at 173-176, where this Court barred inquiry of anyone not only into motives but also into *how* the speech was prepared and into its precise ingredients. More fundamentally, the rationale of the Court of Appeals affords little, if any, protection to a member of Congress against intrusions by the executive and grand jury into privileged activity. Given the complexities of modern-day government, Congressmen must and customarily do require the assistance, cooperation and advice of persons outside their immediate staff in fulfilling the duties of their office. This inescapable fact of modern-day legislative life renders illusory the protection against unconstitutional inquiry announced by the Court of Appeals. Any protection which the Senator has from direct inquiry may be circumvented through the investigation of his privileged activity by the interrogation of private persons with whom he dealt about how he prepared and delivered speeches, votes, committee hearings and so forth.

The Court of Appeals apparently believed that an otherwise impermissible intrusion into the legislative process was legitimate if the interrogators disclaimed any intention to attack the Senator's motives. That this limitation does not ameliorate the patent violation of separation of powers is clear, for four reasons. First, and most basically, the unconstitutionality of a breach of separation of powers

does not depend on whether it was done out of good or bad intentions. Certainly no court would uphold a clear infringement of First Amendment rights because the executive branch acted in good faith; the same is true with respect to the absolute guarantee of the Speech or Debate Clause.[127] Second, if the executive branch and the grand jury may uncover every detail concerning the manner in which a senator, for example, decided to give a controversial speech, his motives for doing so are readily inferable. Third, this standard is unenforceable; the Court of Appeals rejected as "extraordinary" the Senator's motion that the Justice Department specify the purpose and nature of its proposed inquiries (P.W.C. 13a). And fourth, the reason that courts do not delve into the motives of legislators is that to do so would be "indecent, in the extreme." *Fletcher* v. *Peck*, 6 Cranch, 87, 3 L.Ed. 162, 176 (1810) (Marshall, C.J.) It is equally unseemly to pry into privileged *acts*. The District Court was therefore correct in holding that no witness before the grand jury could be questioned about Senator Gravel's privileged acts and his motives for performing them.[128]

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[127] Compare Mr. Justice Brandeis' celebrated statement in *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928):

> "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

[128] Our only quarrel with the District Court's opinion is that it did not define privileged acts broadly enough, *i.e.*, by excluding publication of the record from the protected area.

B. THE INVESTIGATION OF A SENATOR'S PRIVILEGED ACTS THROUGH THE INTERROGATION OF THOSE WHO ASSISTED HIM HAS THE SAME POTENTIAL FOR INTIMIDATION, HARASSMENT AND DISTRACTION AS IF THE SENATOR WERE QUESTIONED DIRECTLY.

The proposed inquiry by the Executive and grand jury into the Senator's privileged legislative acts, even under the limitations placed by the Court of Appeals, is directly violative of separation of powers; and the Executive has asked the assistance of the federal courts, by way of their compulsory process, in a manner which would indeed make the courts a party to an unconstitutional end. This provides ample reason for this Court to hold the inquiry barred by the Speech or Debate Clause.

In addition, the Executive's proposed inquiry runs afoul of the Speech or Debate Clause in another, albeit related, way. An important purpose of the Clause is to guarantee "practical security" to congressmen and to prevent "intimidation by the executive." *United States* v. *Johnson, supra,* at 179, 181. In considering this question, then, the courts must "look particularly to the prophylactic purposes of the clause." *Id.,* at 182. The Solicitor General has now conceded (what would appear in any case to be self-evident) that direct interrogation of a congressman about his legislative activities before the grand jury carries with it an obvious potential for intimadation and harassment. (S.G.P. 9-10.)[129] Yet it is a mystery why the Solicitor General does not recognize exactly the same potential in the interrogation of persons who assisted the congressman in executing his constitutional functions.

In its petition for certiorari, the Justice Department pointed out the one and only difference between the in-

[129] For historical examples of breaches of the privilege by inquisitorial bodies, see fn. 20, *supra.*

vestigation of a congressman's privileged conduct through personal questioning and the same investigation accomplished by the interrogation of those who assisted him in the performance of his duties; namely, that in the latter case his own time is not being expended in the grand jury room (S.G.P. 11). While the avoidance of this result is of course one purpose of the Clause, see *Powell* v. *McCormack*, *supra*, at 505, the major thrust of the privilege is to foreclose intimidation and harassment. Jefferson's and Madison's powerful protest against the intrusion and intimidation by the grand jury in *Cabell's* case was wholly independent of whether Cabell himself was interrogated personally, which apparently he was not. See pp. 53-58, *supra*. If a senator knows that the executive branch, and federal grand juries, may investigate every detail of his legislative activities as a result of his giving a controversial (or displeasing) speech or holding a committee hearing, or in casting his vote in a manner questioned by the Executive, he will certainly think twice before discharging his duties uninhibitedly. The result of permitting the interrogation of those who assisted him in his decision-making process would be to intimidate the legislator from seeking advice and assistance on controversial matters, which are those in which he needs it the most. It will also deter those who would render such assistance and then face the choice of breaching every confidence before the grand jury or going to jail for contempt. Finally, in terms of "distraction," we did not understand this Court in *Powell* to suggest that this term has only a temporal content. Manifestly, a congressman will not be oblivious to the fact that an intensive grand jury investigation into his privileged activities is occurring, with an uncertain scope and outcome, and this is bound to distract him from the maximum performance of his duties. And the fact that he had not been called may cut the other way. The congressman has no

right to be in the grand jury room during the secret, inquisitional interrogation of those who assisted him, he cannot object to the most outrageous of inquiries, and he cannot even be sure of the degree to which the Executive and grand jury have intruded into his privileged conduct. It thus may be even more intimidating of a congressman for the Executive to intrude into his legislative activities in circumstances where the interrogation is in a secretive chamber and is of those over whom he has no certain control.[180]

C. Prior American and English Cases have Prohibited the Testimony of Nonmembers about the Legislative Acts of Members.

On several prior occasions, courts in both the United States and Great Britain have held that a legislator may invoke the privilege to bar the interrogation of persons who assisted him in the discharge of his duties. While these cases are, in varying degrees, distinguishable from the present situation, each deals with the intercession of the speech and debate privilege to prevent the questioning of nonmembers with respect to the legislative acts of members.

In perhaps the situation closest to the instant case to have reached this Court, the Court held that it was error for the judiciary to allow *any* persons, including aides and complete outsiders, to be questioned with respect to a member's legislative acts. In *United States* v. *Johnson*, *supra*, four defendants were convicted under an indictment charging conspiracy to defraud and substantive acts under a conflicts of interest statute. The conspiracy counts alleged, essentially, that the defendants had conspired to defraud

[180] Grand jury transcripts are not readily available, and the District Court summarily denied Senator Gravel's motion for a transcript to be kept and made available to him. (App. 19.)

the United States of its right to have the official business of the Department of Justice conducted honestly and free of undue pressure and influence. As this Court described the "broad outline" of the conspiracy, two congressmen (including Johnson) agreed with two officers of a Maryland savings and loan institution, that the congressmen would exert influence on the Justice Department to obtain dismissal of a pending indictment against a loan company and its officers. As part of the conspiracy, Congressman Johnson was to give and did in fact give a speech on the floor of the House favorable to independent savings and loan associations. The two congressmen approached officials of the Justice Department and tried to influence them to drop the indictment. Congressman Johnson received fees allegedly disguised as "campaign contributions" for these services.

This Court did not discuss the case in terms of in what repects the Speech or Debate Clause protected Johnson in accepting a bribe [131] or in applying unlawful pressure on the Justice Department. On the contrary, this Court specifically noted that:

> "No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." *Id.*, at 172.

In other words, this Court considered the Speech or Debate Clause applicable only to legislative activities; and "influence peddling," particularly where it involved an in-

[131] The *Johnson* court did hold, however, that "a prosecution under a general criminal statute" so "dependent on . . . inquiries" necessarily touching upon the preparation for, delivery of, and motives behind a speech, "necessarily contravenes the Speech or Debate Clause." *Id.*, at 184-185.

trusion by the legislator into prosecutorial activities specifically delegated by the Constitution to the executive and judicial branches, could not be considered within the sphere of legislative duty.[132]

But other of Johnson's activities, illegal and badly motivated though they may have been, were ruled by this Court to be within the clear ambit of and related to "the due functioning of the legislative process," namely, "the manner of preparation and the precise ingredients of the speech [and] the motives for giving it." *Id.*, at 175-176. In order to protect the Congressman's privilege under the Speech or Debate Clause, this Court held that it was error for the trial court to allow questioning of the Congressman, *his administrative assistant, and outsiders* representing the loan company, with respect to their knowledge of or participation in the preparation of the speech and its delivery. *Id.*, at 173-176. Thus, while the Court did not have to reach the question whether such aides and outside assistants and parties could be prosecuted and held criminally accountable for their participation in the Congressman's perhaps unlawful but nevertheless privileged acts involving the speech,[133] it prohibited any questioning of

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[132] Nor, in fact, is such "influence peddling" an act which is "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U.S. at 204. See fn. 51, *supra*.

[133] "Only the question of the applicability of the Speech or Debate Clause to the prosecution of Johnson is before us. The Court of Appeals affirmed the convictions of co-defendants Edlin and Robinson [who were connected with the savings and loan association] whose appeals were consolidated with that of Johnson [in the Court of Appeals] and, except for a brief as *amicus curiae* submitted by Edlin, questions raised in those cases have not been presented to us. The defendant [Congressman] Boykin took no appeal from his conviction." *United States* v. *Johnson*, *supra*, at 172-173, n. 3.

anyone where that questioning involved protected legislative activities. Since the attempts to pressure and influence the Department of Justice were found to be outside the scope of legislative activities, the Government was not prohibited from questioning either the Congressman or his aides or other parties about that conduct.

It should be noted that this Court in *Johnson* was dealing with the trial of a criminal indictment. Yet the Court did not analyze the applicability of the Clause primarily in terms of any immunity from criminal prosecution afforded to either the member or his nonmember associates.[134] Instead, this Court chose to isolate the legislative acts from the nonlegislative acts and prohibit *questioning* of *anyone* regarding legislative acts.[135]

English law is in accord. In *Ex parte Wason*, L.R. 4 Q.B. 573 (1868), a complainant charged that a nonmember conspired with two members of the House of Lords to deceive the House by making speeches in the House which they knew to be false and libellous of the complainant.[136]

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[134] And see fn. 133, *supra*.

[135] One might imagine a case where it is obvious from the face of an indictment that the criminal charge and a protected legislative activity are so intertwined that prosecution of the indictment necessarily would involve questioning delving into protected legislative activity. This is one of the questions being faced by this Court this term in the *Brewster* case, *supra*, but in the instant case only questioning, and not accountability, is involved. See also fn. 131, *supra*.

After Congressman Johnson was retried and convicted, he appealed on the ground that the indictment was void because original grand jury investigation violated the Speech or Debate Clause. The Court of Appeals stated that evidence taken by the grand jury was "constitutionally impermissible" but, citing the rule of *Costello* v. *United States*, U.S. ( ), held that this did not invalidate a facially sufficient indictment.

[136] The complainant in this case was the same person as the plaintiff in *Wason* v. *Walter*, *supra*, which established the right of members and printers to publish allegedly libellous speeches and reports.

Although this conspiracy was a crime under English law, *id.*, at 574-575, the Court held unanimously that no information could issue against *any* of the defendants. The gravamen of the charge was that the members improperly prepared and delivered speeches, which is privileged conduct. This conduct was immune from the cognizance of the courts for, as Mr. Justice Lush said:

> ". . . [W]e ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House." *Id.*, at 579.

And Chief Justice Cockburn said:

> "It is clear that statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person. And a conspiracy to make such statements would not make the persons guilty of it amenable to the criminal law." *Id.*, at 576.

The court thus did not allow the case to proceed against the members or outsider, for *either* charge would have required the introduction of testimony concerning the legislative acts of the members themselves.

This doctrine was also followed in *Rex* v. *Rule*, 2 K.B. 372 (1937), in which a legislator's constituent was convicted for publishing defamatory libels. He had written to his member of Parliament indicating that he had documents proving that a detective and a justice of the peace were guilty of criminal conduct. The member wrote the constituent, requesting that the constituent mail to him the

documents. "These can be forwarded to me with utmost confidence. . . ." *Id.*, at 377. The court attached particular significance to the fact that the member requested the information of his constituent in confidential fashion. *Id.*, at 376. Thereafter, the constituent sent the materials to the member, for which the former was prosecuted. Lord Hewart, C.J., writing for the court said:

> "It is sufficient for the purpose of this case to say that in our judgment a Member of Parliament to whom a written communication is addressed by one of his constituents asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct on the part of some public official acting in that constituency in relation to his office, has sufficient interest in the subject-matter of the complaint to render the occasion of such publication a privileged occasion. When once it is seen that a decision favourable to the appellant requires no more than this limited assertion of the interest of a Member of Parliament in the welfare of his constituents, it appears to us impossible to resist the conclusion that the conviction cannot be supported." *Id.*, at 380.

The court thus recognized that the imperative of free communication between a legislator and his constituents necessarily implies that the legislator can invoke his privilege to bar questioning of the constituent with respect to the privileged relationship.

It is essential to bear in mind in any analysis involving the testimonial privilege of the Speech or Debate Clause that the prohibition against inquiry extends *only* as far as is required in order to protect the congressman's legislative activities from being "questioned in any other place." Congressmen themselves are not immune from questioning,

nor from prosecution for that matter, with respect to non-legislative activities. Certainly, aides and others who assisted a congressman in *nonlegislative* acts could also be questioned and held accountable. And this Court has made clear that at least in one situation the privilege is not coterminous between a congressman and a party who assist him; when that party enforces an unconstitutional order, he may be subject to restraints by the courts, which have the obligation to protect individual rights. *Powell* v. *McCormack, supra. Kilbourn* v. *Thompson, supra.*

In keeping with this rather simple set of standards, this Court has dealt with several situations arising under the Clause after the *Johnson* case. In *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), the Court was faced with a civil action arising out of the subpoenaing of an organization's documents and records in the name of a Senate subcommittee. The petitioners charged the respondents with an unconstitutional conspiracy with state officials. The chairman and legal counsel of the Internal Security Subcommittee of the Senate Judiciary Committee raised the Speech or Debate Clause in defense.

This Court upheld the dismissal of the action as against the Senator. There was no evidence that the Senator himself was a party to the conspiracy. With respect to the subpoena, the Court pointed out that the Senator was engaged "in the sphere of legitimate legislative activity" and he should neither be held liable nor even be made to spend time and energy defending the action. *Dombrowski* v. *Eastland, supra,* at 84-85. The Court noted that the Senator's immunity from liability for legislative acts was absolute. *Ibid.*

With respect to respondent Sourwine, the subcommittee's counsel, the Court stated that the immunity is "*less absolute, although applicable,* when applied to officers or employees of a legislative body, rather than to legislators themselves."

Id., at 85. (Emphasis added.) However, there was some question as to whether or not Sourwine conspired with Louisiana authorities to violate the plaintiffs' constitutional rights—a nonlegislative act. The Court was obviously satisfied that if indeed Sourwine committed any nonlegislative and illegal acts, he was *not* doing it in conjunction with the Senator or under his direction. This Court specifically ruled that "[t]he record does not contain evidence of [Senator Eastland's] involvement in any activity that could result in liability," and it further found that the Senator was engaged "in the sphere of legitimate legislative activity." *Id.*, at 84-85. If indeed Sourwine committed the acts complained of, this Court must have been convinced that he was on a frolic of his own, in concert with illegally-acting state authorities. It was on this basis that the Court reversed a summary judgment granted to Sourwine below, and sent the case back for a hearing on his liability and, if necessary, damages. The rationale for this decision is quite simply that it was not necessary to hold Sourwine immune from either questioning or liability in order to protect the sanctity of the Senator's legislative activities.

That this is the extent of the Clause's "less than absolute" applicability to nonmembers of the legislative branch is confirmed by *Powell* v. *McCormack, supra.* Although the action was dismissed against the named congressmen defendants, this Court held that it had jurisdiction over the ministerial employees, such as the sergeant-at-arms, who had enforced an unconstitutional resolution. In so doing, they were acting as any law enforcement official who carries out an unconstitutional act and infringes an individual's secured rights; and this Court had not only the power, but indeed the duty, under the doctrine of *Marbury* v. *Madison,* 1 Cranch, 137, 2 L. Ed. 60 (1803), to examine the legality of the congressional act and vindicate the constitutional rights of Powell and his constituents. This intervention by the Court was not a breach of separa-

tion of powers; it was a classic example of preserving that doctrine. At issue only was the Court's duty to set aside an unconstitutional act; *the Court certainly did not suggest that the sergeant-at-arms or others could be questioned about how and why the congressmen decided to speak and vote the way they did.*

The result in *Powell* was dictated by the earlier decision of *Kilbourn* v. *Thompson, supra,* where the plaintiff challenged the constitutionality of a House resolution ordering his arrest and imprisonment for having refused to respond to a subpoena issued by a House investigating committee. The Court held the members completely immune from judicial inquiry, but upheld jurisdiction over Thompson, the sergeant-at-arms of the House, for false imprisonment, since the House had no power to punish for contempt in the circumstances, and the resolution leading to the arrest was constitutionally void. This Court in *Powell* summed up in one sentence the essential doctrine set forth consistently in all of the Speech or Debate cases until that time involving nonmembers:

> "The Court first articulated in *Kilbourn* and followed in *Dombrowski* v. *Eastland* the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the *unconstitutional* activity are responsible for their acts." 395 U.S. at 504. (Emphasis added, footnote omitted.)

The cases thus uniformly make clear the proposition that unless the nonmember acts unconstitutionally, he cannot be "questioned in any other Place" while he is engaged in the member's legislative activities. And when unconstitutional infringement of another's protected rights forces the court to act under the *Marbury* doctrine, the courts will

act as gingerly as possible, dealing with the ministerial employees and not delving into the member's legislative activities or into any confidential relationships between member and nonmember.

D. The Inhibiting Effects of a Grand Jury Investigation into Legislative Activity are Heightened when Persons are Interrogated who Rendered Necessary Assistance to the Senator in Meeting his Obligations.

We have shown in the preceding pages that both policy and the case law establish that any inquiry by the Executive, with the assistance of the grand jury, into the privileged activities of a congressman is barred by the Speech or Debate Clause because, first, it would amount to a clear violation of separation of powers, and second, because it carries such a high potential for intimidation, harassment and distraction of the congressman as to bring into play the prophylactic purposes of the Clause.

These principles are not dependent upon the identity or status of the person from whom privileged information is compelled, for the essential constitutional evil is the breach of the sanctity of the legislative process. In this case, however, an additional and significant element is added by the fact that the Executive seeks to accomplish its investigation of Senator Gravel's privileged conduct by interrogating his personal aide and printers whose assistance was indispensable in the execution of his legislative obligations.

There is now, and has been throughout Anglo-American legal history, good reason why courts have held that the legislative privilege may not be defeated by questioning or intimidating those who work closely with legislators, and particularly those who stand in a confidential relationship to the legislator. Some of these reasons are evident from the history; others are evident from the nature of legisla-

tive work, particularly in our modern, complex society and government.

1. *Aides.*

It is particularly unseemly in this case to have the executive branch seeking to thwart a legislator's privilege by questioning personal aides and assistants, since the Executive has long and consistently championed a testimonial privilege for executive aides—even though the Executive's privilege is not explicit in Article II. See *Barr* v. *Matteo*, 360 U.S. 564 (1959). The President has time and again refused to allow his personal aides to testify before Congress on matters concerning foreign policy. Very recently the President has invoked "executive privilege" in refusing to provide the House Government Information Subcommittee with documents and information relating to United States aid programs in Cambodia.[137] And numerous administrations, since the trial of Aaron Burr, have invoked this privilege against judicial inquiry in both criminal and civil proceedings.[138] On other occasions as well, the Executive has stressed the need for a confidential relationship between principals and aides, and in at least two recent cases has argued that the principal and the aide should be treated as one, the aide being the "alter ego" of the principal.[139] The reasons given by the Executive for assert-

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[137] The New York Times, March 17, 1972, p. 7, col. 1.

[138] A number of such incidents are collected in Wolkinson, Demands of Congressional Committees for Executive Papers, 10 Fed. Bar J. 103 (Part I), 223 (Part II) (1949).

[139] In its petition for rehearing with suggestion for rehearing en banc filed with the Court of Appeals for the Fifth Circuit in *United States* v. *J. W. Robinson et al.* (No. 71-1058), the Justice Department argues that the signature of a close aide to the Attorney General should suffice to validate and authorize an electronic

ing that his privilege precludes questioning of his aides are equally applicable to the congressional privilege. As was stated by then-Assistant Attorney General (now Mr. Justice) Rehnquist in his written statement on executive privilege before the Foreign Operations and Government Information Subcommittee of the Government Operations Committee of the House: "It includes the confidentiality of conversations with the President, of the process of decision making at a high governmental level and the necessity of safeguarding frank internal advice within executive branch.[140] According to this official statement by the office of legal counsel of the Justice Department, the President not only can refuse to provide Congress with specific information and documents, but he can also refuse to allow "intimate advisors to appear as witnesses before Committees of Congress."[141] In a spirit of evenhandedness that it appears to have forsaken in the instant case, the Department of Justice went on to add "that the integrity of the decision-making process which is protected by executive privilege in the Executive Branch is apparently of equal importance to the Legislative and Judicial Branches of the

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interception application under 28 U.S.C. § 510, notwithstanding the statute's requirement of personal authorization by the Attorney General. "The practice of having a personal aide in whom an official must and does repose total confidence is well known and widely accepted not only in the executive branch, but in the legislative branch as well (cf. *United States* v. *John Doe, Mike Gravel, United States Senator, Intervenor*, Nos. 71-1331, 71-1332, 71-1335 (1st Cir.), decided January 7, 1972, slip op. at 11-12). The nature of such a relationship demands that the aide and the officer be treated as one," *id.*, Justice Department's brief at p. 6. In *Doe* v. *McMillan*, F. 2d (D.C. Cir. 1972), the Justice Department successfully argued for the privilege to extend to congressmen aides, the public printer and committee consultants, who aided a congressional committee to issue a report.

[140] Statement of William H. Rehnquist (June 29, 1971), at p. 11.

[141] *Id.*, at p. 16.

government." [142] And one former member of the executive branch, the late Dean Acheson, emphasized the importance of protection of aides from testimonial subpoenas by analogizing them to law clerks of judges.[143]

Similar arguments advanced consistently by the Justice Department prior to this have been accepted by this Court. In *Barr* v. *Matteo, supra,* a subordinate official in the executive department was sued for libel after maliciously issuing a press release which challenged the integrity of two cities and referred their names to Senator Joseph McCarthy. Barr's only defense was that this communication fell within the executive privilege.[144] This Court agreed. After noting that the Court had created rules of absolute privilege to immunize judges and their staffs and executive officers of cabinet rank, in a manner paralleling the constitutional privilege of members of Congress, *id.*, 569-570, and observing that the reason for each privilege was that adverse court action would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching dis-

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[143] *Id.*, at 19.

[143] Mr. Acheson gave the Separation of Powers Subcommittee of the Senate Judiciary a telling argument:

> "There was a bill recently under consideration in the House to impeach a Justice of the Supreme Court—if it had gone through to impeachment, I am sure the Chief Justice would have ruled inadmissible the House manager calling upon the law clerks to testify as to their talks with the Justice. One cannot inquire into that confidential relationship. These are practical matters . . . ." Executive Privilege: The withholding of information by the Executive, hearings before the Separation of Powers Subcommittee of the Senate Judiciary Committee, Statement of Honorable Dean Acheson (July 28, 1971), at 265.

[144] Barr was represented by an attorney from the Department of Justice.

charge of their duties," *id.*, at 571, this Court held that these considerations dictate its application to subordinate officials.

Reiterating the functional approach to privileges which we have endeavored to outline earlier in this brief, the Court stated:

> "The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." *Id.*, 572-573. (Footnote omitted.)

Even closer to the factual setting of the instant case is the companion case to *Barr, Howard* v. *Lyons,* 360 U.S. 593 (1959). That case was a libel suit against a captain in the navy for preparing a memorandum to his immediate superior and publishing that memorandum by sending copies to members of Congress, concerning conditions in the Boston Naval Shipyard. Following the principles enunciated in *Barr,* this Court held Captain Howard to be immune from suit.

The *Barr* and *Howard* decisions therefore lend additional support to the thesis that official privilege, to be viable, cannot be constricted in an arbitrary manner which fails to take account of the realities of governmental life and the purposes of the privilege. It thus cannot exclude staff and other necessary confidential assistants. It seems indisputable that were Dr. Rodberg a member of the staff of a judge or executive official, or were Beacon Press officials

aiding the President in editing and preparing for publication a sensitive document of importance, they would be immune from questioning about official duties. Since the source of the privilege herein asserted is a provision of the Constitution which "itself gives an absolute privilege to members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in session," *Barr* v. *Matteo, supra,* at 569, the scope of the congressional privilege surely must be given at least as much respect.[145]

2. *Printers.*

The Court of Appeals, for unexplained reasons, drew an unbridgeable distinction between "aides" and "third parties" and proceeded to lump printers of legislative proceedings in the latter category. Yet such printers are hardly akin to persons who merely come into casual contact with a legislator. Unlike other private parties, printers play a

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[145] Of course, insofar as the adoption of the common law executive privilege is justified by the separation of powers doctrine, the executive privilege might be seen as being of constitutional dimensions, although obviously less explicitly constitutional than the legislative privilege. It should be noted that the Court of Appeals in the instant case concluded that Senator Gravel was protected from questioning about the Pentagon Papers, even though the publication was not covered by the Clause, by a privilege akin to the common law executive privilege enunciated in *Barr* v. *Matteo*. *United States* v. *John Doe,* 451 F. 2d 466 (1st Cir. 1972) (P.W.C. 10a-11a).

Similarly, the English Parliament has acted to guard against a seeming chink in the armor of its privilege of free speech. By the law of Parliament, "a clerk or officer of the House or shorthand writer employed to take minutes of evidence before the House or any committee thereof may not give evidence elsewhere in respect of any proceedings or examination had at the bar or before any committee of the House without the special leave of the House." Commons Journals (1818) 389. This was discussed favorably in the Report from the Select Committee on the Official Secrets Acts (1939) at p. ix.

unique and historic role in enabling a congressman to perform adequately an important duty of his office—informing his colleagues and the electorate. And as we have shown before, the framers believed that the Speech or Debate Clause would provide the people's representatives with enough of a fence around their activities so that they could freely contribute to enlightening the electorate. In discharging this obligation, it should go without saying that a congressman cannot be confined to the use of his xerox machine.

The issue of the degree to which the legislative privilege guards against the interrogation and intimidation of printers who assist legislators in executing the informing function is hardly a novel one. Historically, much litigation in England arose out of efforts to restrain printers from publishing Parliamentary proceedings. The outcome of this litigation has been the extension of the privilege to printers. The English courts have held that printers are immune not only from questioning, but even from accountability.

As has been pointed out, *supra,* for many years the Crown was brazen enough to wage virtual war with Parliamentarians who displeased the sovereign by aiming criticism at the royal house or its pet projects and prerequisites. But the Crown did not always choose to attack the member directly, particularly in later years when the powers of the monarch began to wane and those of the Parliament were on the rise. Furthermore, when a party other than the Crown chose to attack Parliament or a member thereof, that party often could not attack directly.

One of the more common avenues of attacking Parliament's privilege indirectly was to focus on those who published and disseminated the words spoken in the House and reports delivered in or to the House. The English courts at first held that the privilege had no application in these

circumstances, but these decisions were subsequently overruled by statute and by judicial decision.

In the case of *Stockdale* v. *Hansard*, 9 Ad. & E. 2, 112 Eng. Rep. 1112 (1839), the English courts refused to extend the Parliamentary privilege to a printer who published material at the specific direction of the House. Interestingly, the Court of Appeals in the instant case placed some reliance on this decision (P.W.C.-8a). The *Stockdale* case, however, while it might have found favor with the Court of Appeals, found no favor with the English Parliament which, in a monumental debate, excoriated the *Stockdale* court, and pronounced the opinion to be an aberration which would never occur again.

The debates precipitated by this decision took place almost immediately following it. The House of Commons was in a virtual frenzy because Stockdale had been able to recover damages against Hansard, who, upon the request and instruction of the Speaker of the House, had published and disseminated a report, presented by a prison inspector to a House committee, which was highly critical of the management of the prison at Newgate. The report mentioned Stockdale in an unfavorable light, and he sued Hansard and recovered on several occasions. The House grew frustrated at the multiple suits, and finally ordered Stockdale imprisoned while it debated how to deal with the situation.

Lord John Russell, a noted member of the House of Commons, presented the dilemma squarely at the outset and posed the alternatives. The House, he said, could retreat and "might have abandoned their resolution [to print the report]," or

> "they might have determined to vindicate their powers upon the consideration that all necessary functions for legislation must be allowed to the House of Commons; and, conceiving the publication of its reports

to be one of its necessary functions, they might have proceeded to vindicate their privileges." 52 Parliamentary Debates (Hansard) at 253 (1840).

While no member was being attacked *directly* by Stockdale or by the King's Bench, nevertheless, said Russell:

> "what [the Members of the House] had to consider was, in what manner their privileges were to be maintained; what they had to consider was, whether by any possibility they could allow the goods of a *servant of their House* to be seized because he had acted in execution of their order, and had printed their report, which was essential for their legislation; whether they could permit these goods to be *taken from themselves through their servant* and be handed over to the plaintiff . . . ." (Emphasis supplied.) *Id.*, at 255-256.

It was pointed out that this was a deviation from the prior law:

> "When the House considered, however, that for many years the question had not been raised, when it had been thought, from the uninterrupted practice of Parliament ever since the Revolution, and from the recorded judgment of Lord Kenyon [in the case of *Rex* v. *Wright*, discussed *supra*, pp. 77-78], that there was little doubt upon the subject, and when they now found the judgment of a court of law impeaching that practice, they could but admit, that the sheriffs had an embarrassing duty to perform." *Id.*, at 256.

Lord Russell pointed out that in the *Wright* case, "another printer, and not . . . the printer of the House," had printed "voluntarily . . . . the proceedings of a secret

committee of the House," and Lord Kenyon ruled that the printer could not be charged in a criminal information for libel since "[t]his report was first made by a committee of the House of Commons." *Id.*, at 258. Russell observed that until *Stockdale*, there was "no reason to doubt that such was the declared law . . . ." *Ibid.*

House Member Fitz Roy Kelly, in proposing a weakening amendment to Russell's proposed legislation to remedy the erroneous *Stockdale* decision, protested that only members should be able to claim the privilege for themselves, and that the privilege of free speech should not be extended so that "any man, with the Speaker's authority, might commit any crime, from the consequences of which he should be relieved when challenged in a court of law." [146] *Id.*, at 268. Some House members were in favor of the House indemnifying Hansard for the judgments against him, rather than asserting the privilege to encompass the printer.[147] One member felt that the printer should have stated the faults found in the prison, without mentioning Stockdale's name.[148]

The Attorney General rose to expound on the prior law, pointing out that "[t]his was a privilege that had existed for upwards of two centuries," and that while printing was not known in the early days of the privilege, the privilege obviously had to extend to printers since "if they were any new mode by which information could be conveyed to the people, it might be adopted by the House of Commons from time to time." *Id.*, at 280. He pointed out that if the *Stockdale* case were allowed to stand, it would interfere with the

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[146] This is an early "parade of horribles" to which the Government and the Court of Appeals have reverted.

[147] This was, for example, the substance of an amendment offered by Mr. Fitz Roy Kelly and seconded by Lord Eliot. *Id.* at 277-278.

[148] Speech of Lord Eliot. *Id.*, at 278.

House's functioning, since "there had been many persons like Mr. Stockdale, who, if they had thought that an action could be maintained, would have been anxious to place themselves in a similar situation." *Id.*, at 280. In modern tones echoing the functional approach to the privilege and the requirement that it protect legislative activities, not nonlegislative activities which happened to be committed by a Parliamentarian or his aide or printer, the Attorney General denied that under his interpretation of the privilege the courts could not interfere in a case, for example:

> "where a House of Parliament clearly travelling beyond its jurisdiction should make an order so monstrous, illegal, and preposterous, that no attention ought to be paid to it. For instance, if the House of Commons were to order a man to be put to death for some supposed offence. Would any one deny that to make an order as to the publication of papers essential to its proceedings was within the jurisdiction of Parliament?" *Id.*, at 282.[149]

One of the most eloquent and influential speakers in these debates was the great Parliamentarian, Sir Robert Peel. He noted that those papers which it is "most necessary and the most important to publish, were necessarily and unavoidably of a character to afford ground for legal proceedings, if not protected by privilege of Parliament." *Id.*, at 305. He urged the House to bear in mind at all times the *purpose* and *object* of the privilege, and to consider the accomplishment of such purpose more important than the harm or embarrassment which might

[149] The British Attorney General's position on the limits of the privilege in civilized society was apparently adopted by this Court in *Kilbourn* v. *Thompson*.

be caused to persons objecting to the privileged act. *Id.*, at 305-306. He read off a long list of grave abuses, from slavery to official corruption, which were remedied because members of Parliament were free to print and publishers were free to circulate "information directly bearing on the character of individuals, frequently containing matter of which there might be great reason to complain," but if restraint were imposed upon the publication of such matter, "it was impossible that a representative constitution could work to advantage." *Id.*, at 307. He continued:

> "[T]here would have been great reason to complain if, instead of defending themselves from these charges, the parties concerned in the administration of the law had stifled the accusation by proceeding, as in the case of Hansard, against someone, for the publication of the charges." *Id.*, at 307.

Peel went on to excoriate that part of the *Stockdale* v. *Hansard* judgment which held that when publishers distribute House proceedings to the outside world, they are "individuals acting on their own responsibility":

> "What a mockery was this! The Speaker, in the exercise of an admitted privilege, ordered Mr. Hansard to do a certain act, *which could only be done out of the walls of Parliament*, and the moment that Mr. Hansard set to work to execute that order, the privilege of the House was lost, and its agent liable to be punished by a court of law." *Id.*, at 335. (Emphasis supplied.)

He stressed, thus, that members were helpless to disseminate to their constituents important information without the aid of printers who necessarily had to work "out of the walls of Parliament," and that the free speech privilege, without such a logical extension, was a mockery.

The position advocated by Lord John Russell and Sir Robert Peel, and by the weight of prior precedent, won the day, and in the year after the *Stockdale* v. *Hansard* decision, Parliament enacted the Parliamentary Papers Act, 3 & 4 Vict., c. 9 (1840), which provided that criminal or civil proceedings against any persons for publication of papers printed by order of either House were to be stayed. The Act was prefaced by the claim that "it is essential to the due and effective . . . [functioning] of Parliament . . . that no Obstructions or impediments should exist to the Publication of . . . Reports, Papers, Votes, or Proceedings" and that there were of late too many vexatious lawsuits against printers which threatened to hinder such publication. The Parliament did not purport in this act to reverse the decision in *Stockdale* v. *Hansard,* so much as it proclaimed that the privilege set forth in the statute was long part of the common law and merely required a convenient procedural device for a defendant printer to assert in order immediately to stay the effect of any subpoena and ultimately to defeat any proceeding against him.[150]

The persuasiveness of *Stockdale* v. *Hansard* as precedent for the Court of Appeals' or the Solicitor General's position, is further vitiated by the fact that it was, at least *sub silentio,* overruled in the later case of *Wason* v. *Walter,*

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[150] Thus, the Act provided that once a lawsuit was begun against a publisher, it would end upon production of a certificate in court to the effect that the printer was acting by order of either House. The preamble to the Act sees the Act as a mere remedy for obtaining "more speedy protection" than was theretofore available. This is not unlike the concern of American courts that the mere threat of litigation might be sufficient to deter a legislator, and that the Speech or Debate privilege should be assertable at the earliest stage possible, preferably on a motion to dismiss or motion for summary judgment. See *Powell* v. *McCormack,* 395 U.S. at 505-506, especially n. 25.

L.R. 4 Q.B. 73 (1868).[151] in this case, the defendant printer published in a newspaper a report of a parliamentary debate in which a member disparaged the character of the plaintiff. The court went into an explanation of the informing function, *id.*, at 89, and concluded that in deciding the case the court had to take into consideration "the difficulty in which parties publishing parliamentary reports would be placed" if their publishing activities in this sphere went unprivileged and unprotected. *Id.*, at 90. Thus did the court recognize that to allow a printer to be harassed was the functional equivalent of allowing members of Parliament to be harassed: "[T]he difficulty in which parties publishing parliamentary reports would be placed" would be also the difficulty in which members would be placed in their efforts to perform their informing and other legislative duties. The court concluded with the observation that in the event that any publisher ever ran afoul of Parliament's desires with respect to publication of a specific item, Parlia-

[151] Despite some attempts to distinguish the case from *Stockdale*, and even a passing comment that *Stockdale* was left undisturbed, one must honestly conclude that *Wason* did indeed overrule *Stockdale*. One distinction proffered was that *Stockdale* involved a publication which maliciously aimed at damaging an individual, while in *Wason* the publication was aimed primarily at reporting the proceedings of the Parliament for the information of constituents. *Wason* v. *Walter*, *id.*, at 95. It would appear clear that *Stockdale* also involved the function of informing constituents. Furthermore, the *Wason* court made it as clear as it could that, while the Parliamentary Papers Act, 3 Vict. c. 9, was "passed in consequence of the decision in *Stockdale* v. *Hansard*," *id.*, at 92, nevertheless it was not passed because there was thought to be any need "to fix the legality of the publication of parliamentary debates on the sure foundation of statutory enactment," *id.*, at 92; rather, the Act was probably passed as much because of "apprehension" caused by some language used in *Stockdale* "as by any conviction of the defectiveness of the law." *Id.* Finally, the *Wason* court approvingly cited *Rex* v. *Wright*, 8 T. R. 293. See discussion at 77-78, *supra*.

ment could deal with the matter without judicial interference:

> "Should either house of parliament ever be so ill-advised as to prevent its proceedings from being made known to the country—which certainly never will be the case —any publication of its debates made in contravention of its orders would be a matter between the house and the publisher." *Id.*, at 95.[152]

The English courts have thus recognized that a legislator cannot accomplish the informing function alone. While he does not need the army of subordinates which the President needs to accomplish his work, nevertheless he must have at least adequate assistance. The precedents for a senator's using private printers to accomplish this task are numerous in our history,[153] and while there are precedents for attacks on such publishers for aiding legislators, such attacks have been rebuffed in circumstances akin to those in the instant case. This is not to say that any person (or even any congressman or his aide) is free to break the law and steal documents merely because he subsequently "cleanses" his deeds by turning them over for introduction into the legislative process.[154] All aspects of the original

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[152] Similarly, while the Constitution mandates that a "journal" be kept of congressional proceedings, it also allows Congress some leeway in using its discretion to keep certain matters secret. Art. I, sec. 5.

[153] See pp. 85-88, *supra*.

[154] Precisely such a misconception led the Court of Appeals to imagine an entire "parade of horribles" in the event that illegal acts were allowed to be "cleansed" by introducing them into a Senate subcommittee's proceedings. ". . . the consequences of such an unlimited absolute privilege would be staggering." *United States* v. *Doe*, 451 F. 2d 466 (1972). The court felt that Senator Gravel was claiming that by "immersing" the papers in a subcommittee record, he would be retroactively cleansing all events

acquisition may be investigated, except, of course, by inquiries into the legislative process itself. The privilege goes no further than the legislative process.

The fact that legislators and those who assist them in performing their constitutional duties become immune from inquiry into those aspects of their work involving the legislative process does not mean that they are entirely immune from questioning, much less from punishment for abuses and for illegal conduct. Quite the contrary is true. English and American legislatures have broad powers to discipline and punish not only their own members, but aides and "outsiders" who, while engaged in legislative work, run afoul of some standard of law or of decency. From the earliest days of our jurisprudence our legislatures have claimed, and our courts have upheld their claims to, such powers.

In the landmark case of *Anderson* v. *Dunn*, 6 Wheat. 204 (1821), this Court upheld the power of the Congress to punish contempts committed by members and nonmembers alike, including the power to imprison.[155] While such drastic powers in the hands of legislatures have been to some extent curtailed (see, for example, *Kilbourn* v. *Thompson, supra*), and while the requirements of due process of law have been read into such powers (see *Groppie* v. *Leslie*,

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leading up to the papers being obtained and turned over to the Senator. *United States* v. *Doe*, Opinion on Rehearing, F. 2d

Quite to the contrary, Senator Gravel does not seek to protect any aspect of or actor in the Pentagon Papers case other than his acquisition (not his source's acquisition) of them, his staff's preparation of the papers for the subcommittee hearing, and Beacon Press' preparation of the papers for publication and its ultimate publication and distribution of them.

[155] Anderson involved an attempt by a non-member to bribe a member to give a speech.

U.S.), nevertheless such powers still undoubtedly exist. See *Groppie* v. *Leslie, supra.*[156]

The Congress has, in addition to its powers to punish, other methods for controlling abuses of privileges. These were summed up by the select committee of the House of Commons which was assigned to study the problems engendered by claims by the Crown that Parliamentarians were bound by the provisions of the Official Secrets Act which allowed interrogation by the Attorney General of persons suspected of knowing of security leaks. Said the committee in its final report:

> "The House of Commons has disciplinary powers over its members, and a member who abuses his privilege of speech may be punished, not merely by suspension from the service of the House, but by imprisonment or expulsion from the House, or both. Expulsion at least cannot be considered a light penalty. It is not so much on penal sanctions, however, that Your Committee would desire to rely for the prevention of abuses of parliamentary privilege prejudicial to the safety of the realm, as on the good sense of members themselves, who are as much concerned as ministers to prevent such abuses. Their inquiry has . . . brought home to members the need for discretion on their part in framing questions or seeking information regarding matters which affect the safety of the realm, and has impressed upon ministers of the Crown that the powers conferred upon the executive by the Official

[156] See also *Cochran* v. *Couzens*, 42 F. 2d 783 (D.C. Cir. 1930), where the court granted the defendant Senator absolute immunity from a slander action complaining of words uttered in a Senate speech. The *Cochran* court felt that all that could be done was to send the plaintiff to the Senate to ask that the defendant's peers impose a remedy, presumably under art. 1, sec. 5, cl. 2 of the Constitution. 42 F. 2d at 784.

Secrets Act must not be used in such a way as to impede members in discharging their parliamentary duties." Report from the Select Committee on the Official Secrets Acts, *supra,* at xv.

As Clement Attlee said in a House of Commons debate concerning effort by the Crown Attorney General to question a member of Parliament concerning the source of his acquisition of classified defense secrets:

> "Unless Members of Parliament can have reasonable access to knowledge they cannot criticize ministers effectively. It is our duty to criticize Ministers who are in charge of the administration.
>
> . . . . . .
>
> "In practice Members of Parliament do not abuse their privileges; we are not a House of spies and traitors, and the House has its own method of dealing with Hon. Members and of keeping them within bound. I think it is essential for the life of this House that this House itself should make itself responsible for Hon. Members. There is a danger in any suggestion that there should be some outside court or sanction brought in." Debate in Sandys' case, Commons Journal, June 30, 1938, at 2167.

E. A Balancing of Competing Social Interests Dictates the Recognition of the Privilege in this Case.

This Court's vindication of the privilege in the case at bar would not, contrary to the Solicitor General's asserted fears, open up a pandora's box for law enforcement and the administration of the criminal laws. First of all, as the paucity of reported American cases on the subject shows,

it is rare indeed that a legislator by himself, or in concert with nonmembers, acts within the legislative sphere in such a way as to run afoul of the civil or criminal law. In some cases, where the victims of civil abuses have sought redress, the courts have found the authority to grant relief in order to protect constitutional rights. *Powell* v. *McCormack, supra; Kilbourn* v. *Thompson, supra; Dombrowski* v. *Eastland, supra; Hentoff* v. *Ichord, supra.* In other cases, legislatures have exercised their powers to discipline or punish wayward members and nonmembers alike without courting or allowing interference from other branches. *Anderson* v. *Dunn, supra; Groppie* v. *Leslie, supra.* In still other cases, where criminal infractions were involved, Congress has sought narrowly to delegate powers to the judiciary. *United States* v. *Brewster, supra.*

Secondly, even in exceptional cases, an investigation can be conducted without inquiry into legislative activities. Where both legislative and nonlegislative conduct are involved, the legitimate area of inquiry can be segregated by a specification of questions that the Executive intends to ask prospective witnesses before the grand jury,[157] or some similar form of relief can be fashioned to accommodate the ends of the privilege and the demands of justice.

This Court has not hesitated to impose serious limitations upon law enforcement investigations which intruded into constitutionally protected conduct. When inquiries of

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[157] While Senator Gravel asked the District Court to quash the subpoena altogether, he did offer the alternative that the Justice Department be ordered to specify the questions which it intended to ask of the Senator's aides and associates. (App. 2, 12.) With such a protective order, the Senator would have been satisfied to have the subpoenaed witnesses appear before the grand jury, since he would then not have to guess whether or not the witness would be constant in his refusal to violate the privilege, or worry that the witness' interpretation of the matters protected might differ from his own.

other investigative bodies of stature at least equal to the grand jury were perceived to have an inhibiting effect on the exercise of First Amendment rights, those investigations were not allowed to proceed unchecked and the Government was required to *at least* make a showing of a specific and compelling reason, factually supported, for the inquiry. See, *e.g., DeGregory* v. *Attorney General of New Hampshire,* 383 U.S. 825 (1966), and cases cited therein. Even judged under these standards, which were imposed in areas where there were no separation of powers considerations, the present inquiry would not be permitted. The Justice Department has offered no reason at all—let alone a specific and compelling one—for its investigation into Senator Gravel's legislative activities, although it was given ample opportunity to do so in the lower courts. It takes more than unspecified and purely hypothetical claims of impeding law enforcement to counterbalance a constitutional right of this magnitude; otherwise, there is nothing to prevent virtual fishing expeditions into the Capitol. And surely there is no reason why the grand jury, which is subject to the supervisory powers of the federal courts, should be allowed to conduct an inquiry which would be prohibited of other investigative bodies under conditions involving constitutional rights which, unlike the Speech or Debate Clause, are not absolute.

Finally, it must frankly be admitted and accepted that in a very few hypothetical cases, it is possible that wrongdoing will go unquestioned, uninvestigated, or unpunished because the courts will be found to be without jurisdiction over the offense and the legislature will look aside, perhaps for political reasons or out of solicitude for a member or employee of the legislature. Yet this is an inevitable consequence of our constitutional system. Such results are frequently seen where, for instance, confessions are rendered inadmissible due to the circumstances of their

procurement, and where indictments are defeated because of technical considerations involving territorial jurisdiction or statutes of limitations. It can safely be predicted that far fewer cases of culprits evading justice will result from centuries of vigorous enforcement of the Speech or Debate Clause than result every year from enforcement of portions of the Constitution found in the various amendments. And as Pitt stated in his famous protest against Parliament's notorious action in stripping Wilkes of his privileges upon the claim of the Crown that law enforcement was being paralyzed:

> "Let the objection, nevertheless, be allowed in its utmost extent, and then compare the inexpediency of not immediately prosecuting on one side, with the inexpediency of stripping the Parliament of all protection from privilege on the other. Unhappy as the option is, the public would rather wish to see the prosecution for crimes suspended, than the Parliament totally unprivileged, although notwithstanding this pretended inconvenience is so warmly magnified on the present occasion, we are not apprised that any such inconvenience has been felt, though the privilege has been enjoyed time immemorial." 342 Protests, 68, 73-74 (1763).

It is not terribly probable that a parade of horribles is any more likely to follow this Court's vindication of the privilege in the case at bar than has been true in hundreds of years of English and American history. The occasional instances in which law enforcement is hindered are more than counterbalanced by the preservation, intact, of our system of separation of powers.

"The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency

but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy." *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

In addition, the privilege remains the member's and the right to assert it is his alone. See *Rex* v. *Rule*, 2 K.B. 372 (1937). He can at any time refuse to assert the privilege with respect to the questioning of a wayward aide or associate who foolishly relied on anticipated legislative privilege in violating a law in the course of his legislative work for the senator. A senator should not be presumed to be lightly willing to raise his privilege to prevent questioning of an aide or associate who has, in the senator's judgment, placed the interests of the Nation upon too low a plane. To cite again the assertion of Mr. Attlee during the British Official Secrets Acts debate, *supra*: "[W]e are not a House of spies and traitors . . . ."

Courts should not see such privileges as being at all novel or startling. Privileges of lesser magnitude than the constitutional Speech or Debate privilege are vindicated daily in our courts. The attorney-client privilege is absolute unless waived by the client. The same applies to the priest-penitent privilege, the husband-wife privilege, and, in some jurisdictions, to the doctor-patient privilege. In cases involving such privileges, it matters not who is questioned or accused—the privilege stands with respect to the protected relationships or situations or endeavors. To deny protection to legislative relationships, situations and endeavors in the face of such clear mandate in the Constitution, Anglo-American history, and public policy would be one of the most serious breaches of separation of powers imaginable. This is a narrow case, and a hard-core case. It is not, as

the Solicitor General suggests, on or near the frontiers of the privilege. The simple question, stripped of verbiage and adornment, is whether the executive branch and the grand jury can breach the separation of powers, in the face of specific constitutional prohibition, by conducting an intensive investigation of the activities of the legislative branch. Whether such an investigation is conducted with or without direct questioning of a member is entirely irrelevant in both law and common sense.

Conclusion.

The framers of our Constitution believed that representative democracy could best be served if members of Congress were given unlimited freedom in actions within the scope of their legislative activity. They know that the privilege might be occasionally abused, but they also wisely understood that the risks to democracy in anything less than an absolute privilege, broadly construed and interpreted, was much greater. This perception is as true today as when the Constitution was written. "In the final analysis, no task is likely to be more important to the preservation and ultimate vitality of our governmental system of separation of powers than the widespread popular acceptance of the doctrine of legislative privilege in its most unwavering, pristine and absolute terms." *Cella, supra,* at 43. That is the theory of our Republic.

Senator Gravel respectfully submits that this Court should hold that: (a) the publication by the Senator of the official record of a Senate Subcommittee is encompassed by the protections of the Speech or Debate Clause, and (b) no

witness may be questioned before the grand jury about the Senator's privileged activities.

In No. 71-1026, the judgment should be affirmed.

In No. 71-1017, the judgment should be reversed.

Respectfully submitted,

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